BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 17 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

## No. 577

ARTHUR W. MITCHELL,

*Appellant,*

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

# Brief for Appellant.

RICHARD E. WESTBROOKS,
Chicago, Illinois

and

ARTHUR W. MITCHELL, *Pro Se,*
Chicago, Illinois
*Attorneys for Appellant.*

PRINTED BY CHICAGO LAW PRINTING CO.

FILED NOVEMBER 18, 1940
PROBABLE JURISDICTION NOTED DECEMBER 16, 1940.

BLANK PAGE

## SUBJECT INDEX.


| | PAGE |
|---|---|
| Opinions below | 1 |
| Jurisdictional Statement | 2 |
| Statutory Jurisdiction | 2 |
| Proceedings before the Interstate Commerce Commission | 2 |
| Proceedings before United States District Court | 4 |
| Constitutional Jurisdiction | 6 |
| Jurisdiction by Judicial Interpretation of the Law | 9 |
| Statutes Involved | 10 |
| Statement of the Case | 11 |
| Specification of Errors | 15 |
| Summary of Argument | 18 |
| Argument: | |
| I. The Appellant, an American citizen, was engaged in through interstate travel from Chicago, Illinois, to Hot Springs, Arkansas, as a first-class passenger, he having paid a first-class fare and the separate coach law of the State of Arkansas was inapplicable to this interstate journey | 22 |
| A. A case in point | 32 |
| II. Volume of traffic cannot be used as a basis for discrimination against an interstate passenger holding a first-class ticket | 34 |
| III. The claim by the defendant, Rock Island, that it was attempting to follow the separate coach law of Arkansas and disregard the plain provisions of the Constitution of the United States, and the laws made in pursuance thereof, is untenable, and the report of the Commission shows its misconception of the law | 47 |

PAGE

Argument (continued):

IV. Personal rights ..... 49
A. Personal rights include personal liberty 51

V. Personal rights include the equal protection of the laws and the right to contract for first-class services, accommodations and facilities in interstate commerce, and further includes the right to enforce the contract in the event of its violation by the common carrier ..... 53

VI. The Interstate Commerce Act contains a national comprehensive system for the regulation of interstate commerce, which excludes the application of the local separate coach law of the state ..... 58

VII. Congress has prohibited discrimination, undue prejudice, unreasonable and undue advantage and preference in relation to citizens traveling as interstate passengers ..... 64

VIII. The appellant having suffered direct injury to his rights guaranteed by the Constitution of the United States and laws made pursuant thereof has the absolute right to prosecute these proceedings ..... 66

IX. What is unjust discrimination prohibited by the Interstate Commerce Act ..... 67

X. Custom does not justify continued unjust discrimination ..... 69

XI. Erroneous holding of the Commission concerning the right of the appellant to purchase and use first-class accommodations in interstate commerce ..... 69

PAGE

Argument (continued):

XII. Refund of money is not adequate redress for the wrongful exclusion by a common carrier of an American citizen engaged in an interstate journey as a first-class passenger ..... 73

XIII. Judicial notice ..... 74

XIV. Questions not involved in this appeal ..... 75

XV. The order of the Interstate Commerce Commission and the decree of the District Court should be reviewed by this Court and set aside 77

A. The order rests on an erroneous application of the law ..... 77

B. The order is without any support of evidence ..... 78

XVI. Cases which have been cited by some of the defendants in prior stages of this proceeding which we claim are not in point ..... 79

Conclusion ..... 89

## Table of Cases.

Alabama Ry. Company v. Morris, 103 Miss. 511; 60 So. 11; Ann. Cas. 1915-B, 613..... 85

American Express Company v. United States, 212 U. S. 522, 523, 29 S. Ct. 315..... 69

Anderson v. L. & N. Ry. Company, 62 F. 46..... 30

Armour & Company v. The Alton Ry. Company, 293 October Term, 1940, Op. February 3, 1941..... 9

Arthur W. Mitchell v. Chicago, Rock Island & Pac. Railway Co., 229 I. C. C. 703..... 14, 50

Atchison T. & S. F. Ry. Company et al. v. United States et al., 279 U. S. 768, 770; 49 S. Ct. 494; 73 L. Ed. 947..... 10

PAGE

TABLE OF CASES (CONTINUED).

Baltimore & Ohio Ry. Company et al. v. United States et al., 49 S. Ct. 492; 73 L. Ed. 954; 279 U. S. 781, 783 ..... 9

Baltimore & Ohio R. R. Company v. United States, 277 U. S. 291, 300, 301 ..... 78

Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357 ..... 53

Berea College v. Commonwealth of Kentucky, 211 U. S. 45, 53, 54; 29 S. Ct. 33, 35; 53 L. Ed. 81 (1908) ..... 83

Brown v. Memphis & C. Ry. Company, 7 F. 51, 63 (C. C. Tenn.) ..... 57, 73, 86

Buchanan v. Warley, 245 U. S. 60, 74, 75, 76, 77, 78, 79, 80; 38 S. Ct. 16 (1917) ..... 38, 46, 66, 82, 83

Case of the State Freight Tax, 15 Wall. (82 U. S.) 232 ..... 6, 32, 62

C. & O. R. R. Company v. Kentucky, 179 U. S. 288 ..... 30

C. B. & Q. Railway Company v. Iowa, 94 U. S. 155; 24 L. Ed. 94 ..... 29

Chesapeake & Ohio R. Company v. Kentucky, 179 U. S. 388, 391; 45 L. Ed. 244, 246; 21 S. Ct. 101 ..... 23, 25

Chiles v. Chesapeake & Ohio R. Company, 218 U. S. 71; 54 L. Ed. 936, 30 S. Ct. 667; 20 Ann. Cas. 980 ..... 23, 33, 83

Cohens v. Virginia, 6 Wheat. 264, 379 ..... 8

Cooley v. Board of Wardens, 12 How. 299 ..... 32

Councill v. Western & Atlantic R. R. Co., 1 I. C. C. 339 ..... 55, 57

Cozart v. Southern Ry. Co., 16 I. C. C. 226, 230, (1909) ..... 88

Dent v. West Virginia, 129 U. S. 114, 9 S. Ct. 231 ..... 53

Denver & R. G. R. Company v. Baer Brothers Mercantile Company, 187 F. 485; 109 C. C. A. 337; 34 S. Ct. 641; 233 U. S. 479; 58 L. Ed. 1055 ..... 58

Duncan v. Missouri, 152 U. S. 382; 14 S. Ct. 570 ..... 53

PAGE

TABLE OF CASES (CONTINUED).

Edwards v. Nashville, Chattanooga & St. Louis Ry. et al., 12 I. C. C. 247.....55, 57, 88

Ex Parte Virginia, 100 U. S. 339..... 53

Florida East Coast Ry. Company v. United States, 234 U. S. 167..... 78

Gaines v. Seaboard Airline Ry. et al., 16 I. C. C. 471 (1909)..... 88

Gibbons v. Ogden, 9 Wheat. 1, 196.....30, 31, 32, 33, 62

Gold-Washing & Water Company v. Keyes, 96 U. S. 199, 201..... 9

Gray v. Cincinnati Ry. Co., 11 F. 683, 686..... 57

Hall v. DeCuir, 95 U. S. 485.....24, 29, 30, 31, 32, 33, 45, 53, 54, 86

Harriman v. Interstate Commerce Commission, (N. Y. 1908), 29 S. Ct. 115, 118; 211 U. S. 407, 418; 53 L. Ed. 253..... 58

Hart v. State, 60 Atl. 457, 463; 100 Md. (March 22, 1905).....28, 29, 33, 86

Hartness v. Iberia, etc., Ry. Company (D. C. La. 1924), 297 F. 622, 624..... 59

Haskell v. Cowhan, 187 F. 403, 408..... 32, 62

Heard v. Georgia R. R. Co., 1 I .C. C. 428..... 55, 57

Heard v. Georgia R. R. Co., 3 I. C. C. 111..... 57

Hines et al. v. Davidowitz et al., Op. January 20, 1941, No. 22, October Term 1940.....26, 32, 46, 62

Huff v. Norfolk & Southern R. R. Co., 88 S. E. 344, 345; 171 N. C. 203 (March 22, 1916)..... 29

In Re Grice, 79 F. 627, 645..... 52

Interstate Commerce Commission v. Cincinnati N. O. & Texas Pacific Ry. Company, 167 U. S. 479; 17 S. Ct. 896; 42 L. Ed. 243..... 58

PAGE

TABLE OF CASES (CONTINUED).

Interstate Commerce Commission v. Diffenbaugh, 242 U. S. 42 ..... 78

Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91 ..... 78

Johnson v. Southern Pacific Company, 196 U. S. 1; 25 S. Ct. 158; 49 L. Ed. 363 ..... 59

Lehigh Valley Ry. Company v. Public Service Commission, Second District of the State of N. Y. (D. C. N. Y. 1921), 272 F. 753, Aff'd. (1922); 42 S. Ct. 239; 256 U. S. 591; 66 L. Ed. 385 ..... 61

Logwood and Wife v. Memphis & C. Ry., 23 F. 318, 319 ..... 57

Loomis v. Lehigh Valley Ry. Company, 240 U. S. 43, 48, 50, 59, (1915) ..... 9

Louisville N. O. & T. R. Company v. Mississippi, 133 U. S. 587, 590 L. Ed. 784, 785; 2 Inters. Comm. Rep. 801; 10 S. Ct. 348 ..... 23, 25

Macon Grocery Company v. Atlantic Coastline Ry. Company, 215 U. S. 501, 506, 507, 508 ..... 8

Manufacturers Ry. Company & St. Louis Southwestern Ry. Company v. United States and Interstate Commerce Commission, 246 U. S. 456, 457 ..... 9, 76, 77

McCabe v. Atchison T. & S. F. Ry. Company, 235 U. S. 151, 161, 162 (1914); 59 L. Ed. 169; 35 S. Ct. 69 ..... 16, 23, 24, 30, 34, 35, 38, 41, 46, 49, 50, 58, 71, 75, 77

Merchants Warehouse Company v. United States, et al., 283 U. S. 501, 508 ..... 76

Minnesota Rate Case, 230 U. S. 352; 33 S. Ct. 729; 57 L. Ed. 1511; 48 L. R. A. (N. S.) 1151; Ann. Cas. 1916 A-18 ..... 6, 9, 32

Munn v. Illinois, 94 U. S. 113; 24 L. Ed. 77 ..... 29

Murphy v. Western & A. R. R. Co., 23 F. 637, 639, 640 ..... 57

New England Divisions Case, 261 U. S. 184, 204 ..... 76

TABLE OF CASES (CONTINUED).

PAGE

Northern Pacific Ry. Company v. Solum, 247 U. S. 477, 483, 484 ..... 9

Ohio Bell Telephone Company v. Public Utilities Company of Ohio, 301 U. S. 292, 301 ..... 75
Osborne v. Bank of United States, 9 Wheat. 738, 822 8

Patton v. Brady, 184 U. S. 608, 611 ..... 8
Pearson v. Dunne, 4 Wall. 605 ..... 73
Peik v. Chicago & N. W. R. R. Co., 94 U. S. 164, 24 L. Ed. 97 ..... 29
Pennsylvania Company v. United States, 236 U. S. 351; 35 S. Ct. 370; 59 L. Ed. 616 ..... 67, 76
Plessy v. Ferguson, 163 U. S. 537 ..... 30, 51, 79, 80, 82

Railway Company v. Illinois, 118 U. S. 557; 7 S. Ct. 4; 30 L. Ed. 244 ..... 29
Railroad Commission of Louisiana v. T. & P. Ry. Company, 229 U. S. 336; 35 S. Ct. 837; 57 L. Ed. 1215 ..... 33
Railway Company v. Mississippi, 133 U. S. 587; 10 S. Ct. 348; 33 L. Ed. 784 ..... 9, 33
Rochester Telephone Company v. United States et al., 307 U. S. 125, 130, 135 ..... 9, 78

Seaboard Airline Ry. Company v. United States, 254 U. S. 57, 62 ..... 76
Skinner & Eddie Corporation v. United States, 249 U. S. 557, 562 ..... 76
Smith v. Tennessee, 100 Tenn. 494 ..... 29, 85, 86
Smith v. Texas, No. 33, October Term 1940, United States Supreme Court, Op. November 25, 1940 ..... 57, 80
South Covington & Cincinnati S. T. Ry. Co. v. Kentucky, 252 U. S. 399; 40 S. Ct. 378, (Decided April 19, 1920) ..... 86
South Covington Ry. Co. v. Covington, 235 U. S. 537, 35 S. Ct. 158, 59 L. Ed. 350, L. R. A. 1915 F. 792 ..... 88

PAGE

TABLE OF CASES (CONTINUED).

Southern Pacific Ry. Company v. Interstate Commerce Commission, 219 U. S. 498; 31 S. Ct. 279; 55 L. Ed. 310 ..... 33

Southern Ry. Company v. Norton, 73 So. 1; 112 Miss. 302, (December 4, 1916) ..... 30, 85, 86

Southern Railway Company v. Primrose, 73 So. 2 ..... 85

State ex rel Abbott v. Hicks, 44 La. Criminal ..... 30

State of Missouri at the relation of Lloyd Gaines, Petitioner v. I. W. Canada, Registrar of the University of Missouri and the Curators of the University of Missouri, 305 U. S. 337, 350 ..... 43, 46

Strauder v. West Virginia, 100 U. S. 303, 306; 25 L. Ed. 664 ..... 71, 75

The Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 320 ..... 67, 78

The Daniel Ball, 10 Wall. 557; 19 L. Ed. 999 ..... 33

The Sue, 23 F. 843, 844, 845, 846, 848 ..... 57

Tennessee v. Davis, 100 U. S. 257 ..... 9

Texas & Pacific Ry. Company v. Abilene Cotton Oil Company, 204 U. S. 426, 439; 27 S. Ct. 350; 51 L. Ed. 553 ..... 58

Texas & Pacific Ry. Company v. Interstate Commerce Commission, (N. Y. 1896), 162 U. S. 197; 16 S. Ct. 666; 40 L. Ed. 940 ..... 6, 60, 62

Truax v. Raich, 239 U. S. 33, 38 ..... 66

United States v. Chicago Heights Trucking Company, et al., 310 U. S. 344, 351, 352 (1939) ..... 6, 47, 68

United States ex rel Weinberg v. Scholtfeldt, etc., 26 F. Supp. 283, 284 ..... 74

United States v. F. W. Darby Lumber Co., et al., 82 October Term 1940, Op. February 3, 1941 ..... 6, 62

United States v. Louisville & Nashville R. R. Company, 235 U. S. 314, 320 ..... 76

PAGE

TABLE OF CASES (CONTINUED).

United States v. Maher, 307 U. S. 148, 152 ..... 9

United States of America v. Appalachian Electric Power Company, Op. December 16, 1940, No. 12, October Term 1940, Supreme Court ..... 32

Wabash, St. Louis & Pacific Railway Company v. Illinois, pp. 557, 573, 575, 576, 577 ..... 30

Washington B. & A. Electric R. Company v. Waller, 289 F. 598, 600 (C. C. A. D. C. May 7, 1923) ..... 32, 33

West v. Kansas National Case Company, 221 U. S. 229; 31 S. Ct. 564; 55 L. Ed. 716; 35 L. R. A. (N. S.) 1193 ..... 32

West v. Kansas Natural Gas Company, 221 U. S. 229; 31 S. Ct. 564; 55 L. Ed. 716; 35 L. R. A. (N. S.) 1193 ..... 6, 32

White v. Greenhow, 114 U. S. 307 ..... 9

Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064 ..... 53

STATUTES, CONSTITUTIONS AND TEXTBOOKS.

Separate Coach Law of the State of Arkansas (Pope's Digest, Chap. XX, Sections 1190 to 1201) ..... 8, 11, 13, 15, 18, 22, 26, 28, 35, 47, 50

Title 8, U. S. C., Chap. 3, Sec. 41—Civil Rights ..... 6, 10, 15, 48, 52, 57, 64, 66, 74

Title 8, U. S. C., Chap. 3, Sec. 43—Civil Rights ..... 6, 10, 48, 52, 57, 64, 66, 74

Title 28, U. S. C., Sec. 41, Sub. Div. 14 ..... 4, 8, 10

Title 28, U. S. C., Sec. 41, Sub. Div. 28 ..... 4, 10, 68

Title 28, U. S. C., Sec. 43 ..... 4, 10

Title 28, U. S. C., Sec. 45 ..... 4, 5, 10

Title 28, U. S. C., Sec. 47-a ..... 1, 2, 5, 10

Title 28, U. S. C., Sec. 47-a ..... 1, 2, 4, 10

Title 28, U. S. C., Sec. 48 ..... 4, 10, 15

PAGE

STATUTES, CONSTITUTIONS AND TEXTBOOKS (CONTINUED).

Title 49, U. S. C., Sec. 1, Par. 1.....6, 10, 15, 65
Title 49, U. S. C., Sec. 1, Par. 2.....6, 10, 65
Title 49, U. S. C., Sec. 1, Par. 5.....3, 6, 10, 15, 57, 65, 68
Title 49, U. S. C., Sec. 2.....6, 10, 15, 57, 65, 68
Title 49, U. S. C., Sec. 3, Par. 1.....3, 6, 10, 15, 57, 65, 68
Title 49, U. S. C., Sec. 4.....6, 10, 15
Title 49, U. S. C., Sec. 13, Par. 1.....2, 6, 9, 10, 65, 67
Title 49, U. S. C., Sec. 13, Par. 4.....4, 9, 10, 65
Title 49, U. S. C., Sec. 15, Par. 1.....4, 6, 10
Title 49, U. S. C., Sec. 15, Par. 2.....4, 6, 10
Article I, Sec. 8, Cl. 3, United States Constitution .....6, 11, 15, 45, 63
Article I, Sec. 10, Cl. 1, United States Constitution.... 11
Article IV, Sec. 2, Cl. 1, United States Constitution .....8, 11, 15, 44, 57, 62, 66, 74
Article VI, Cl. 2, United States Constitution.....7, 11, 15, 78
Fourteenth Amendment to the Constitution of the United States, Sections 1 and 5.....8, 11, 15, 57, 66, 74
Oklahoma Statute, Section 7..... 26, 35
Alien Registration Act..... 26
The Federalist..... 27
1 Bl. Com. 134..... 51
5 Wigmore Evidence, Pars. 2571, 2580, 2583..... 75
Thayer Preliminary Treatise on Evidence, pp. 277, 301 ..... 75

APPENDICES
PAGES

APPENDIX A—
Statutes involved ..... 1-11
Constitutional provisions involved ..... 12-13
APPENDIX B—
Separate coach law of Arkansas ..... 15-18
APPENDIX C—
Abstract of evidence before the Commission..... 19-50

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL,

*Appellant,*

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

# Brief for Appellant.

## OPINIONS BELOW.

The District Court, specially constituted under Sec. 210 of the Judicial Code, as amended, (Title 28 U. S. C. A., Secs. 47 and 47-a), for the Northern District of Illinois, Chicago, Illinois, entered an order and decree, June 27, 1940, dismissing the petition, without an opinion, said order and decree, is found in the record, p. 52, attached to the order and decree were the findings of fact and conclusions of law (R. 52). The order of the Interstate Commerce Commission, dismissing the complaint is reported in 229 I. C. C. 703, and is found in the record, pp. 18-34.

## STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

### Statutory Jurisdiction.

The jurisdiction of this Court is based upon Sec. 210 of the Judicial Code, as amended (Title 28, U. S. C., Secs. 47 and 47-a) (Judicial Code and Judiciary) (Appendix A, pp. 4-6). These sections provide for a hearing by a special Court composed of three Judges and for a direct appeal to the Supreme Court of the United States from a final judgment or decree of the Court.

### Proceedings Before the Interstate Commerce Commission.

Arthur W. Mitchell, the appellant, a citizen of the United States and a person within the jurisdiction thereof filed his verified complaint with the Commission under the Interstate Commerce Act (Title 49, U. S. C., 13 (1) ) (Appendix A. p. 9) (R. 3-9). The complaint charged among other things, that the defendants[1] by their conduct towards the appellant had violated certain provision of the Interstate Commerce Act.

After due notice to the defendants answers were filed to the complaint by each of the defendants (R. 7-9). The complaint alleged that the complainant was a passenger, traveling in interstate commerce on a continuous journey

[1] The original defendants to the complaint were Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation; Illinois Central Railway Company, a corporation; and Pullman Company, a corporation.

between Chicago, Illinois and Hot Springs, Arkansas; that the defendants were common carriers engaged in the transportation of passengers between Chicago and Hot Springs, and were subjected to the provisions of the Interstate Commerce Act. That certain provisions of the Interstate Commerce Act, the Constitution of the United States and the Amendments to the United States Constitution had been violated by the acts of the defendants towards the complainant (now the appellant) while on this interstate journey (Title 49, U. S. C., Sec. 1, Cl. 5) (Appendix A, p. 7); (Sec. 2) (Appendix A, p. 8), (Sec. 3, Cl. 1) (Appendix A, pp. 8-9) and (Sec. 13). The complaint further charged that the rights of the complainant guaranteed by the Fourteenth Amendment (Appendix A, p. 12), of the United States Constitution had been violated and that he had been denied the equal protection of the laws by the conduct of the defendants.

He further alleged that the defendants were claiming to justify their conduct towards the complainant by virtue of the Separate Coach Law of the State of Arkansas (Appendix B, pp. 15-17).

A hearing was had and evidence taken before an Examiner of the Commission (R. 9) who made his proposed report to the Commission (R. 10-17).

The Examiner found that the material facts alleged in the complaint had been proven by indisputable evidence but recommended that the complaint be dismissed (R. 17).

Exceptions were duly filed by the complainant (R. 17, 260, 279).[2]

---

[2] The exceptions filed by the complainant, hereinafter called the appellant, were introduced and admitted in evidence by the District Court ~~but~~ Which the Interstate Commerce Commission had marked Exhibit 1 (R. 222).

The cause came on for hearing before the full Commission for oral argument[3] (R. 18) and subsequently the report of the commission was filed (R. 18-33).[4]

The report of the Commission was in accordance with the proposed report of the Examiner and the findings of the facts alleged in the complaint, were found to be fully proven but, the report of the six Commissioners contained erroneous conclusions of law and the complaint was dismissed.

The five dissenting opinions find that the provisions of the Interstate Commerce Act had been violated (R. 30-33).

A petition for rehearing and re-argument was duly filed by the appellant with the Commission (R. 34) which petition was denied (R. 35).

**Proceedings Before United States District Court.**

A petition was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, under the provisions of the Interstate Commerce Act (R. 3-40).[5]

In the District Court the suit was brought against the United States and others[6] were made defendants as pro-

---

[3] Title 49, U. S. C., Secs. 13 (4) (Appendix A, p. 9); Sec. 15 (1) (Appendix A, p. 10); Sec. 15 (2) (Appendix A, p. 11).

[4] Dissenting opinions were filed by five members of the Commission and only six members of the Commission concurred in the report.

[5] Section 24 of the Judicial Code (Title 28, U. S. C., Sec. 41) and (Title 28, U. S. C., Sec. 41 (28) ) (Appendix A, p. 2); (Title 28 U. S. C., Sec. 43) (Appendix A, p. 3); (Title 28 U. S. C., Sec. 45).

[6] The defendants in the District Court were United States of America, Frank O. Lowden, James E. Gorman,

vided by law. Answers were filed by all defendants (R. 41-42) and the cause was set for hearing before a specially constituted Court of three Judges.[7]

The District Court filed its finding of fact and conclusions of law (R. 52, 53) and entered an order and final decree dismissing the cause for lack of jurisdiction at the cost of the complainant (R. 53), June 27, 1940.

Notice of appeal was served and filed in the District Court, August 23, 1940 (R. 53, 54), accompanied by a petition for appeal (R. 55) and assignment of errors (R. 55-61). An order was entered granting the appeal (R. 61) and approving the appeal bond (R. 62). A praecipe for transcript of record was filed (R. 64) and various orders were entered extending the time to file the transcript of record in this Court, to and including November 21, 1940 (R. 63).

An order was entered by the Court that all original petitions be included in the transcript of record and that the same stand in lieu of a narrative statement of evidence and be so certified to this Court (R. 63). This procedure was in accordance with the provisions of the Judicial Code.[8]

The transcript of record was filed in this Court November 18, 1940.

The appellant claimed that the acts of the defendants by their conduct during his journey as an interstate pas-

---

and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation; Illinois Central Railway Company, a corporation; and Pullman Company, a corporation. The Interstate Commerce Commission intervened under the provisions of Title 28, U. S. C., Sec. 45-a (R. 42).

[7] Title 28, U. S. C., Sec. 47 (Appendix A, p. 4) (R. 52, 66-258).

[8] Title 28, U. S. C., Sec. 47-a (Appendix A, p. 6); Title 28, U. S. C., Sec. 48 (Appendix A, p. 7).

senger, had deprived him of his civil rights under the Constitution of the United States and was made in pursuance thereof, the further claim that this Honorable Court has jurisdiction of this cause is based upon the Civil Rights Act also known as the Enforcement Act.[9]

**Constitutional Jurisdiction.**

The Constitution of the United States conferred exclusive jurisdiction upon Congress to regulate interstate commerce.[10]

In pursuance of this constitutional provision Congress enacted the Interstate Commerce Commission Act,[11] which act is of a national character and contains a comprehensive national system regulating interstate commerce intended by Congress to operate without favoritism.[12]

---

[9] Title 8, U. S. C., Chap. 3, Sec. 41—Civil Rights (Appendix A, p. 1); Title 8, U. S. C., Chap. 3, Sec. 43—Civil Rights (Appendix A, p. 2).

[10] Article I, Section 8, Cl. 3, United States Constitution (Appendix A, p. 12).

[11] Title 49, U. S. C., Secs. 1-156; the sections pertinent to the issues involved in this case are Sections 1 (1) (2) (5), (Appendix A, p. 7); 2 (Appendix A, p. 8); 3 (1) (Appendix A, p. 8); 4 (Appendix A, p. 8); 13 (1) (4), (Appendix A, p. 9); 15 (1) (2) (Appendix A, pp. 10-11).

[12] See *U. S. et al.* v. *Chicago Heights Trucking Company, et al.*, 310 U. S., 344, 353; *Minnesota Rate Cases*, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151 Ann. Cas., 1916 A-18. *West* v. *Kansas Natural Gas Company*, 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716; 35 L. R. A. (N. S.) 1193; *Case of the State Freight Tax*, 15 Wall. (82 U. S.) 232; 21 L. Ed. 146; *Texas and Pacific Railroad Company* v. *Interstate Commerce Commission*, 162 U. S. 197, 211, 212. See recent opinion of this Court *U. S.* v. *F. W. Darby Lumber Company, et al.*, No. 82, Oct. Term 1940, Decision Feb. 3, 1941 (Op. 5, 6, 7).

The issues involved in this proceeding necessitated a construction of Article I, Sec. 8, of the United States Constitution, under which the rights of the appellant were alleged to have been violated.[13]

The claim of a violation of his rights under the Constitution and laws made in pursuance thereof, were again asserted in the petition filed in the District Court by the appellant (R. 1-40).

These same constitutional rights of the appellant were again urged in the Assignment of Errors filed in the District Court on this appeal (R. 55-61). In the Statement As To Jurisdiction filed in this Court the appellant again urged that his rights under the Constitution and statutes made in pursuance thereof had been violated by the acts of the defendants.[14]

In the Statement of Points Upon Which Appellant Intends to Rely filed December 2, 1940, in this Court the appellant again urges that his rights under the United States Constitution and laws made in pursuance thereof had been violated (R. 279, 284).

Article VI, Clause 2, United States Constitution, in unambiguous language states that the Constitution and laws of the United States which shall be made in pursuance thereof, etc., shall be the "supreme law of the land."[15]

As a native born citizen of the United States, a resident of the State of Illinois and a Representative in Congress

---

[13] Complaint filed before the Interstate Commerce Commission by the appellant and upon which these proceedings are based (R. 3-7).

[14] See Statement As To Jurisdiction filed in this case, pp. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20.

[15] Article VI, Clause 2, United States Constitution (Appendix A, p. 12).

of the First Congressional District of the State of Illinois,[16] the appellant claimed all privileges and immunities of citizens of the several states, while in this interstate journey,[17] claiming a violation of his rights, privileges and immunities secured by the Constitution and laws of the United States and that such violation and deprivation had been brought about under color of the Separate Coach Law of the State of Arkansas and under claim by the defendant, Rock Island,[18] that the discrimination practiced against the appellant, by it, was under color of the Separate Coach Law of Arkansas (R. 178), the District Court had jurisdiction under Title 28, Section 41 (14).[19]

This claim by the appellant that his constitutional rights had been violated by the acts of the defendant, gave rise to a case arising under the Constitution and laws of the United States.[20]

---

[16] Fourteenth Amendment to Constitution of United States, Sections 1, 5 (Appendix A, p. 12).

[17] Article IV, Section 2, Clause 1, United States Constitution (Appendix A, p. 12).

[18] For brevity sake Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway, a corporation, is designated in this brief as the "Rock Island."

[19] See (Appendix A, p. 2).

[20] See *Macon Grocery Company* v. *Atlantic Coast Line Railway Company,* 215 U. S. 501, 506, 507, 508, in which case at page 506 the Court quotes from *Patton* v. *Brady,* 184, U. S. 608, 611 and states "It was said by Chief Justice Marshal that 'a case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either,' *Cohens* v. *Virginia,* 6 Wheat. 264, 379; and again, when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States and sustained by the opposite construction.' *Osborne* v. *Bank of United States,* 9 Wheat.

**Jurisdiction by Judicial Interpretation of the Law.**

This Honorable Court in a recent decision held that it is imperative that any person who claims that his rights secured by the Interstate Commerce Act have been violated while traveling as an interstate passenger, on a common carrier, must pursue and exhaust his remedies before the Interstate Commerce Commission before applying to the District Court for redress.[21]

The District Court in dismissing the petition of the appellant for lack of jurisdiction, although a negative order, in form was a denial of the rights, privileges and immunities claimed by the appellant and in effect was an affirmative order. Such order and decree is final and appealable directly to this Court.[22]

---

738, 822. See also *Gold-Washing & Water Company* v. *Keyes*, 96 U. S. 199, 201; *Tennessee* v. *Davis*, 100 U. S. 257; *White* v. *Greenhow*, 114 U. S. 307; *Railroad Company* v. *Mississippi*, 102 U. S. 135, 139."

[21] *Armour and Company* v. *The Alton Railroad Company*, 293, Oct. Term 1940, Opinion rendered Feb. 3, 1941, in which the Court states (Op. 1) "The ground on which the Circuit Court affirmed was that the issues involved presented administrative problems, necessitating primary resort to the Interstate Commerce Commission. The sole question we find it necessary to decide is whether the Circuit Court was correct in this conclusion. * * * (Op. 6). The principles making up the so called primary jurisdiction doctrine are well settled. This is obviously a case for their application." See *Loomis* v. *Lehigh Valley Railway Company*, 240 U. S. 43, 48, 50, 51 (1915); *Northern Pacific Railway Company* v. *Solum*, 247 U. S. 477, 483, 484. Title 49 U. S. C., Sec. 13 (1) (4) (Appendix A, p. 9). *Minnesota Rate Cases*, 230 U. S. 352, 419.

[22] *Rochester Telephone Company* v. *United States, et al.*, 307 U. S. 125, 130, 135; *U. S.* v. *Maher*, 307 U. S. 148, 152; *Baltimore & Ohio Railroad Company, et al.* v. *United States, et al.*, 49 S. Ct., 492, 73 L. Ed. 954; 279 U. S. 781, 783; *Manufacturers Railway Company and St. Louis Southwestern Railway Company* v. *United States and Interstate Commerce Commission*, 246 U. S. 457, 456.

A direct appeal to this Court is authorized from the final order and decree entered in this cause by the three Judge Court June 27, 1940.[23]

## Statutes Involved.

The statutes involved are so lengthy that for convenience they are included in Appendix A and B of this brief. The constitutional provisions are also included in Appendix A. Request is made that the statutes and the constitutional provisions be read as a part hereof.

The statutes are: Appendix A—

Title 8, U. S. C., Chap. 3, Sec. 41—Civil Rights.
Title 8, U. S. C., Chap. 3, Sec. 43—Civil Rights.
Title 28, U. S. C., Sec. 41, Sub. Div. 14.
Title 28, U. S. C., Sec. 41, Sub. Div. 28.
Title 28, U. S. C., Sec. 43.
Title 28, U. S. C., Sec. 45.
Title 28, U. S. C., Sec. 47.
Title 28, U. S. C., Sec. 47-a.
Title 28, U. S. C., Sec. 48.
Title 49, U. S. C., Sec. 1, Par. 1.
Title 49, U. S. C., Sec. 1, Par. 2.
Title 49, U. S. C., Sec. 1, Par. 5.
Title 49, U. S. C., Sec. 2.
Title 49, U. S. C., Sec. 3, Par. 1.
Title 49, U. S. C., Sec. 4.
Title 49, U. S. C., Sec. 13, Par. 1.
Title 49, U. S. C., Sec. 13, Par. 4.
Title 49, U. S. C., Sec. 15, Par. 1.
Title 49, U. S. C., Sec. 15, Par. 2.

---

[23] Title 28 U. S. C. Sec. 47-47a (Judicial Code, Section 210); *Atchison Topeka and Santa Fe Railway Company, et al.* v. *United States, et al.*, 279 U. S. 768, 770, 49 S. Ct. 494, 73 L. Ed. 947.

The Constitutional provisions are: Appendix A—

Article I, Sec. 8, Cl. 3, United States Constitution.
Article I, Sec. 10, Cl. 1, United States Constitution.
Article IV, Sec. 2, Cl. 1, United States Constitution.
Article VI, Cl. 2, United States Constitution.
Fourteenth Amendment to the Constitution of the United States, Sections 1 and 5.

Appendix B—

Separate Coach Law of the State of Arkansas (Pope's Digest, Chap. XX, Sections 1190 to 1201).

## STATEMENT OF THE CASE.

On September 2, 1937, the appellant filed a complaint (R. 1-7) with the Interstate Commerce Commission (hereinafter called the Commission) naming as defendants Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees of the Chicago, Rock Island and Pacific Railway Company (hereinafter called the Rock Island), the Illinois Central Railway Company (hereinafter called the Illinois Central), and the Pullman Company, alleging that the defendants had violated the provisions of the Interstate Commerce Act, Sec. 1, Clause 5 (R. 6), Sec. 2 (R. 4), Sec. 3, Clause 1 (R. 4, 5), and Section 13. (See *Statement of Jurisdiction* pp. 2-7.)

He further claimed that he had been denied the equal protection of the laws under the Fourteenth Amendment. He prayed for a cease and desist order (R. 7).

The acts complained against were alleged to have occurred while the plaintiff was engaged on a continuous interstate journey from Chicago, Illinois, to Hot Springs, Arkansas, as a first-class passenger in interstate commerce holding a first-class railroad ticket for which he had paid

the regular first-class fare (three cents per mile) according to the established and published tariff filed with the Commission by the carriers (R. 3, 4, 5, 6, 7).

The complaint alleged that the defendants were common carriers and subject to the provisions of the Interstate Commerce Act. The specific acts of the defendants were set up in the complaint (R. 3, 4, 5, 6, 7). The defendants answered the complaint (R. 7-9).

The Pullman Company claimed that it had furnished without discrimination, the first-class accommodations to the appellant for which he had paid and that it did not own nor control the inferior accommodations which the appellant was compelled to occupy between Memphis, Tennessee, and Hot Springs, Arkansas, during a part of his interstate journey (R. 8, 9).

The Illinois Central admitted that the plaintiff purchased the first-class round trip ticket from Chicago to Hot Springs from that company and that he paid for it the regular fare charged all other first-class passengers, and that it did furnish to the appellant equal accommodations with all other white passengers holding first-class tickets for this interstate journey while appellant was traveling on the railroad from Chicago to Memphis (R. 8).

The Rock Island admitted the substance of the complaint by the appellant but denied that such acts stated were a violation of the Interstate Commerce Act and the Fourteenth Amendment to the United States Constitution, and further claimed to have acted under the Arkansas separate coach law (R. 7-8).

The undisputed and uncontradicted testimony of the chief witness, Albert W. Jones, a conductor employed on the Rock Island for 32 years, fully sustains the allegations contained in the complaint. An excerpt from the abstract of his testimony is found in R. 36, 37, 38. The testimony

abstracted is found (R. 158-159, 159-160, 162) (R. 163-164, 165, 166, 170, 171, 172, 173). (See "Statement of Jurisdiction," pp. 7, 8, 9.)

A hearing was held before an Examiner of the Commission at Chicago, Illinois, March 7, 1938 (R. 9). The complete transcript of the evidence is contained in the R. 67-213. For the convenience of the Court we have included in the Appendices to Brief for Appellant as Appendix C, appendices pp. 19-50, and the abstract of the evidence contained in the initial brief filed with the Commission and upon which evidence the Commission made its findings.

The testimony of Arthur W. Mitchell, appellant (Appendix C, pp. 19-35); Edward H. Carey, a witness for the appellant (Appendix C, pp. 35-37); William Harrison, a witness for the appellant (Appendix C, pp. 37-39); John J. Pullen, a witness for the appellant (Appendix C, pp. 39-40); Elias A. Morris, a witness for the Appellant (Appendix C, pp. 40, 41); Thomas Price (Appendix C, pp. 33-35).

The separate car law of Arkansas which permitted the carriers to haul sleeping or chair car for the exclusive use of either white or African race separately, but not jointly, was introduced in evidence (Appendix C, p. 41) (R. 127, 211-213) (Appendix B, pp. 15-17).

The defendants offered as witnesses Albert W. Jones, a conductor employed by the Rock Island for 32 years, who had charge of the train between Memphis and Hot Springs at the time of the eviction of the appellant from the first-class accommodations, although the appellant held a first-class ticket and was engaged in an interstate journey (Appendix C, pp. 41, 42, 43, 44, 45, 46, 47, 48, 49); William S. Scott, employed as brakeman for the Rock Island, who testified as a factual witness for the defense

(Appendix C, p. 49). The testimony of A. C. McGuire for the defense is found (Appendix C, pp. 49-50).

The appellant also testified that Conductor Jones, at the time of the ejection of the appellant stated that there "are no first-class accommodations for colored people on this train."

We will not repeat a description of the first-class accommodations as the same have been substantially described in the report of the Commission (R. 22), and the second-class, or "jim crow" car is also fairly described in the report of the Commission (R. 22-23). The Examiner also describes the first-class accommodations for white citizens traveling in interstate commerce (R. 13).

After the Commission had dismissed the complaint, a petition for rehearing and reargument was denied (R. 35). The report of the Commission, including the five dissenting opinions, was filed (R. 18-33). (See *Arthur W. Mitchell* v. *Chicago, Rock Island & Pacific Railway Company*, 229 ICC 703, which contains the finding of fact and conclusions of law.)

April 20, 1939, a petition was filed in the District Court for the Northern District of Illinois, Eastern Division, in equity, as provided by the Urgent Deficiencies Act, Title 28, Section 41 (27) and (28), and Sections 43-48. The petition requested the district Court to set aside, annul, and vacate the order of the Commission. The United States and the three original defendants were made parties to the suit in the District Court and the Interstate Commerce Commission intervened.

Answers were filed. The United States (R. 41), the Interstate Commerce Commission (R. 42-44), the Rock Island (R. 44-45), the Pullman Company (R. 46-50), the Illinois Central (R. 50-52). These same issues were raised by the plaintiff and by defendants as were raised by the Com-

mission. The District Court heard the matter as a three-Judge court and without opinion dismissed the complaint for want of jurisdiction (R. 53). The findings of fact and conclusions of law filed with the order of dismissal are found in this record (pp. 50-53).

An appeal was prosecuted to this Court pursuant to the statute and probable jurisdiction was noted December 16, 1940. The questions presented are contained in our Specification of Errors herein filed.

## Specification of Errors.

The final order and decree of the District Court dismissing the petition at the cost of the appellant and sustaining the order of the Interstate Commerce Commission was erroneous and should be reversed for the following reasons:

1. In holding that the separate coach law of Arkansas applied to the appellant who was an interstate passenger and traveling in interstate commerce, is contrary to the plain provisions of the Constitution of the United States, Article I, Section 8, Clause 3; Article IV, Section 2, Clause 1: Article VI, Clause 2; and the Fourteenth Amendment to the Constitution of the United States, and denied to the appellant the equal protection of the laws.

   a. It was contrary to the Interstate Commerce Commission Act passed by Congress in the exercise of its exclusive jurisdiction over interstate commerce. Title 49, U. S. C., Sections 1-156 and in particular, Section 1, paragraphs 1, 2, 5, Section 2, Section 3, paragraph 1, and Section 4.

   b. It was contrary to the laws passed by Congress under the Fourteenth Amendment to the Constitution and known as the Enforcement Act or Civil Rights Act Title 8, U. S. C. Chapter 3, Sections 41 and 43.

c. It was contrary to the decisions of the Supreme Court of the United States which held that the separate coach laws of the several states do not apply to Interstate Commerce. *McCabe* v. *Atchison, Topeka and Santa Fe Railway,* 235 U. S. 151, 35, and cases cited under Point 1 of the argument in this brief.

2. In holding that the common carriers could deny to the appellant, an American citizen of color traveling as an interstate first-class passenger, the equal accommodations and facilities furnished all white persons traveling as first-class interstate passengers on the same continuous journey and who had paid the same rate of fare because the volume of traffic of American citizens of color did not warrant the providing of equal accommodations was a denial of the equal protection of the laws to the appellant in violation of the Constitution of the United States, the laws made in pursuance thereto, and the decisions of this Honorable Court heretofore pronounced. (See above cited authorities.)

3. In sustaining the claim of the defendant Rock Island that it was attempting to follow the separate coach law of Arkansas by the ejection of the appellant from the first-class accommodations afforded by the carrier and occupied by the appellant for part of his interstate journey, was a denial to the appellant of the equal protection of the laws guaranteed by the Constitution and laws of Congress made in pursuance thereof, and contrary to the decisions of this Honorable Court heretofore promulgated. (See authorities above cited.)

4. In holding that American citizens of color traveling in interstate commerce who have paid for first-class accommodations and facilities for a continuous journey were not entitled to the equal accommodations and facilities furnished white citizens traveling as first-class passengers on the same interstate journey solely on the ground of

color denied to the appellant the equal protection of the laws enjoyed by all white citizens and violated his Constitutional rights.

5. In holding that the ejection of the appellant who was traveling in interstate commerce as a first-class passenger and occupying first-class accommodations furnished to all white interstate passengers holding first-class tickets on the same journey, and the failure to furnish the appellant with equal first-class accommodations for his entire journey, and for which he had paid, was unjust and undue discrimination and was contrary to the Constitution and the laws of the United States, the decisions of this Honorable Court, the decisions of the lower Federal Courts, the State Supreme Courts, and the former decisions of the Interstate Commerce Commission and was a denial of the equal protection of the laws to the appellant. Such holding by the District Court was a denial of the due process of law to the appellant.

6. The appellant having contracted with the defendant and paid for first-class accommodations and facilities on an interstate journey, and having been accepted as such first-class passenger for part of the interstate journey, the holding of the District Court that the carrier could eject the appellant from the first-class accommodations and facilities on the sole ground of his race and color was a violation of the Interstate Commerce Act and denied to the appellant the equal protection of the law.

7. In holding that the finding and order of the Interstate Commerce Commission was supported by the evidence when the record shows that the findings and order of the Commission are contrary to the undisputed and uncontradicted evidence of the witnesses for the defendant Rock Island and wholly unsupported by any evidence appearing in the record when the report of the Commission on its face shows that its holdings are contrary to the Constitu-

tion and laws made pursuant thereto, and the decisions of this Honorable Court.

8. In holding that the order of the Commission is supported by the findings when the undisputed evidence in the record shows that the findings clearly show a violation by the defendants of the Constitutional rights of the appellant.

9. In holding that the District Court was without jurisdiction to grant the relief sought in the complaint or any part thereof, and dismissing the complaint when the undisputed evidence contained in the record showed a violation of the Interstate Commerce Act by the defendant, and a violation of the Constitutional rights of the appellant.

## SUMMARY OF ARGUMENT.

### I.

The Separate-Coach Law of Arkansas was not applicable to the appellant who was a first-class passenger engaged in a continuous interstate journey.

### II.

Volume of traffic is no legal defense when a carrier bases its right to refuse first-class accommodations to an American citizen traveling in interstate commerce and who has paid for a first-class ticket entitling him to such accommodations where it appears that all white persons traveling on the same journey and having paid the same rate of fare were being furnished with first-class accommodations by the carrier during their entire journey.

III.

A carrier is not legally justified in ejecting an American citizen of color traveling as a first-class passenger in interstate commerce and who has paid for and been accepted as such first-class passenger for a part of his journey, from the first-class accommodations and compel the interstate passenger to complete his journey in a jim crow car which afforded only second-class accommodations inferior to the first-class accommodations and the carrier's claim that it was attempting to follow or comply with the separate-coach law of a state and disregard the mandate of the United States Constitution and the decisions of the United States Supreme Court, ~~the carrier's claim~~ is without merit.

IV.

Personal Rights—The constitutional right of the appellant was invaded by the defendant, Rock Island, in being wrongfully ejected from first-class accommodations while engaged in a continuous interstate journey and for which first-class accommodations the appellant had paid the regular fare and been accepted as a first-class passenger for part of the journey, the Rock Island by its acts,

(a) violated the Interstate Commerce Act:

(b) breached its contract of carriage with the appellant and disregarded the laws of Congress made to enforce the Fourteenth Amendment of the Constitution and ignored the decisions of this Honorable Court.

V.

American citizens of color have the same rights to contract for first-class service in interstate commerce and when a first-class ticket has been purchased by an American citizen of color he has the constitutional right to be

furnished by the common carrier engaged in interstate transportation of passengers, with first-class accommodations equal to the first-class accommodations by the carrier to all white citizens traveling as first-class passengers in interstate commerce.

VI.

The Interstate Commerce Act is a national comprehensive system and excludes the Arkansas Separate-Coach law from applying to a citizen traveling in interstate commerce.

VII.

Congress has prohibited discrimination, undue prejudice, unreasonable and undue advantage and preference in relation to citizens traveling as interstate passengers.

VIII.

The appellant having suffered direct injury by the conduct of the defendant Rock Island, had the absolute right to begin and prosecute these proceedings.

IX.

Unjust discrimination prohibited by Interstate Commerce Act defined.

X.

Custom does not justify continued unjust discrimination.

XI.

The erroneous holding of the Commission concerning the right of the appellant to purchase and use first-class accommodations in interstate commerce should not be sustained.

XII.

A refund to the appellant for the wrongful violation of his constitutional rights is not adequate redress.

XIII.

The Court will take judicial notice of matters of common knowledge.

XIV.

Questions not involved in this appeal.

XV.

The order of the Interstate Commerce Commission and the decree of the District Court should be reviewed and set aside.

XVI.

Cases which have been cited by defendants in prior stages of this proceeding and which we claim are not in use.

## ARGUMENT.

### I.

**The appellant, an American citizen, was engaged in through interstate travel from Chicago, Illinois, to Hot Springs, Arkansas, as a first class passenger, he having paid a first class fare and the separate coach law of the State of Arkansas was inapplicable to this interstate journey.**

The inapplicability of the Separate Coach Law of the State of Arkansas[24] to the continuous interstate journey of the appellant was urged in the Exceptions filed by the appellant to the proposed report of the Examiner.[25]

The complaint alleged that the appellant was a first-class passenger engaged in an interstate journey from Chicago, Illinois, to Hot Springs, Arkansas, and that he had contracted and paid for, at the rates demanded by the defendants a first-class round trip ticket for this interstate journey (R. 3). This fact is undenied and therefore stands admitted.[26]

The proposed report of the examiner also states that the appellant was an interstate passenger.[27]

---

[24] Appendix B, pp. 15-17.

[25] R. 265-266-267, under title "Discrimination and Segregation not Accepted by Complainant."

[26] See answers filed by each of the defendants (R. 7-8) for the Rock Island (R. 8), for the Illinois Central Railroad Co. (R. 8-9), for the Pullman Company.

[27] (R. 10, Statement of Facts), (R. 12-13, Statement of Findings based upon indisputable evidence), (R. 16, "There was no break in complainant's journey at the Tennessee-Arkansas State Line. He was engaged in through interstate travel from Chicago to Hot Springs").

The report of the Commission also supports the continuous interstate journey of the appellant.[28]

The allegation that the appellant was engaged in a continuous interstate journey from Chicago to Hot Springs, was proven by undisputed and uncontradicted evidence.

This Honorable Court in *McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151 at page 60 conclusively settled the question as to the inapplicability of a separate coach law of a state to interstate passengers and at page 160, succinctly and in language which is unambiguous states as follows:

> *Fifth.* "That the act, in the absence of a different construction by the state court, must be construed as applying to transportation exclusively intrastate, and hence did not contravene the commerce clause of the Federal Constitution. *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587, 590, L. Ed. 784, 785, 2 Inters. Comm. Rep. 801, 10 S. Ct. Rep. 348, *Chesapeake & O. R. Co.* v. *Kentucky*, 179 U. S. 388, 391, 45 L. Ed. 244, 246, 21 S. Ct. Rep. 101; *Chiles* v. *Chesapeake & O. R. Co.*, 218 U. S. 71, 54 L. Ed. 936, 30 S. Ct. Rep. 667, 20 Ann. Cas. 980." • • •
>
> In view of the decisions of this court above cited, there is no reason to doubt the correctness of the first, second, fourth, and fifth of these conclusions."

We believe it can be safely said that all Federal and State Courts, familiar with the doctrine above enunciated by this Honorable Court in the *McCabe* case, *supra*, and which doctrine has been the law applicable to interstate

[28] (R. 29, "There was no break in the complainant's journey at the Tennessee-Arkansas State line. He was engaged in through interstate travel from Chicago to Hot Springs.")

commerce since the days of Chief Justice Marshall, have consistently sustained the same.

It makes no difference whether the highest court of the state has passed upon the applicability of a state statute and construed it as applying only to intrastate commerce because the decisions of this Honorable Court are final on all matters involving federal questions.

This *Honorable Court in McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151, 59 L. Ed. 169, 35 S. Ct. 69, 70, adopts as the law the conclusions of the Circuit Court of Appeals for the Eighth Circuit,[29] in its statement of the law concerning the non-application of a separate coach law to passengers traveling in interstate commerce.

We think it is well to consider the opinion of Circuit Judge Adams, of the Eighth Circuit, in his treatment of the well settled principles of law concerning the non-applicability of a state statute to citizens traveling in interstate commerce (186 F. 966) at page 972:

> "(5) Is this statute an invasion of the exclusive prerogatives of Congress over interstate commerce?
>
> It may be conceded that, if it applies to interstate transportation, it is a regulation of interstate commerce within the meaning of the Constitution. We think this follows from the doctrine laid down by the Supreme Court in *Hall* v. *De Cuir*, 95 U. S. 485, 24 L. Ed. 547. In that case a law of Louisiana as interpreted by its highest judicial tribunal required carriers of interstate commerce when operating within the limits of the state to receive colored passengers into cabins set apart for white persons. The court said:

[29] (C. C. A. 8, 186 Fed. 966, 972), (109 C. C. A. 110.)

'It (the statute) does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within.'

This, it was held, interfered directly with the freedom of interstate commerce, and therefore encroached upon the exclusive power of Congress. See, also *Louisville, etc., Ry. Co.* v. *Mississippi*, 133 U. S. 587, 590, 10 S. Ct. 348, 33 L. Ed. 784, and *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 391, 21 S. Ct. 101, 45 L. Ed. 244.

For like reasons, the Oklahoma law, if, as properly construed, it embraces or relates to interstate commerce at all, would also be a regulation of that commerce. It compels carriers when operating in that state to exclude colored persons from cars or compartments set apart for white persons. The only difference between the Louisiana and the Oklahoma law is that the one compels carriers to receive into and the other to exclude colored persons from cars or compartments carrying white persons. They act alike directly upon the carrier's business as its passengers cross the state line. Hence, if one is a regulation of interstate commerce, the other must be. The contention, therefore, that the provisions of the Oklahoma statute do not amount to a regulation of interstate commerce, if they concern that commerce at all, is untenable."

The Court was considering the proviso to Section 7, that part of the Separate Coach Law of the State of Oklahoma, which is identical in substance, with the section of the Arkansas Separate Coach Law now under considera-

tion, both of which operate the regulation of sleeping cars and other first-class accommodations within the states.[30]

The decisions of this Honorable Court were presented to the Examiner[31] and to the Commission.[32] These decisions were commented upon by the Commission in its report,[33] but were misunderstood by the Commission as shown by the misapplication of the law to the facts in the case at bar.

This Honorable Court in *Hines, etc., et al.* v. *Benard Davidowitz, et al.*,[34] held that the Alien Registration Act[35] was a comprehensive plan enacted by the Federal Government and operated on all aliens within jurisdiction of the United States; that all previous local state laws concerning the registration of aliens, yielded to the Act of Congress and were no longer applicable to the subject of

---

[30] The Oklahoma Statute, proviso to Section 7, is recited 186 Fed. 966-970 and is as follows:

"Provided that nothing herein contained shall be construed to prevent railway companies in this state from hauling *sleeping cars, dining or chair cars* attached to their trains, to be used exclusively by either *white* or *Negro* passengers, separately, but not jointly. Laws 1907-1908, c. 15."

Separate Coach Laws of Arkansas, Appendix B, pp. 15-17, is as follows:

1193 "Separate sleeping and chair cars. Carriers may haul *sleeping or chair cars* for the exclusive use of either the *white* or *African* race separately, but not jointly" (R. 126).

[31] See Exceptions on behalf of plaintiff to report proposed by Examiner (R. 260-279 particularly page 265, under title, Discrimination and Segregation are not Accepted by the Complainant).

[32] By Petition for Rehearing and Reargument filed by the appellant.

[33] See (R. 24, 25).

[34] No. 22, Oct. Term 1940, Opinion Jan. 20, 1941.

[35] Public Act No. 670, 76th Congress, 3rd Sess., c. 439.

which Congress had been given power to act under the Constitution.

We believe that this Honorable Court had in mind the comprehensive system governing national transportation enacted by Congress and known as the Interstate Commerce Act, when holding in the various cases heretofore decided by this Court, that local separate coach laws of the various states were not applicable to American citizens traveling in interstate commerce.

The necessity for exclusive jurisdiction to regulate interstate commerce was recognized by Hamilton as early as 1783, in his resolutions for a general convention.[36]

We believe the Commission overlooked the law concerning separate coach laws of the several states in relation to Interstate Commerce and has misunderstood the provision of the complainant in relation thereto. On page 12 of the report (Par. 2) it is stated (R. 27):

> "At the hearing complainant stated that segregation was not involved and apparently for the purposes of this case he accepted it, regarding the Arkansas statute as requiring it in that State for all passengers, both interstate and intrastate."

The appellant does not wish to be understood as accepting segregation in Interstate Commerce under any state law as the Constitution of the United States (Fourteenth Amendment) and the laws enacted to enforce the provisions of the same, prohibits any state from denying to any citizen, white or black, the equal protection of the

---

[36] The Federalist, Hamilton in 1783, Page 6, Par. ~~Eighty,~~ Eightly and again by Madison in 1788, Federalist Paper No. 42, 'General View on Powers Proposed to be Vested in the Union,' page 332. "The powers included in the *third class* are those which provide for the harmony and proper intercourse among the states." See p. 333.

laws and prohibits any state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States. The Enforcement Act passed by Congress provides that all citizens black and white are entitled by law to the same rights, privileges and immunities in every state, and any law of any state which denies to a black citizen the same protection of the law received by a white citizen is in conflict with the Constitution and laws of the United States. No self respecting white citizen, we believe would accept segregation solely on account of his color or race and the same applies to any self respecting black citizen.

It would be contrary to the decisions of the Supreme Court to accept the Arkansas separate-coach law or any other separate-coach law as applying to passengers traveling in Interstate Commerce.

We believe the Commission disregarded the law as laid down by the Supreme Court of the United States and consistently followed by all Federal Courts which hold that, "the Separate Coach Laws of the several States do not apply to interstate commerce," and follow the two decisions from the State of Tennessee and Mississippi, and which have not been followed nor approved by other jurisdictions.

The Supreme Court of Maryland, in *Hart* v. *State*, 60 Atl. 457, 463, 100 Md. (March 22, 1905), refused to follow *Smith* v. *Tenn., supra,* after stating that the Supreme Court of the United States on analogous questions had held to the contrary.

Mr. Justice Boyd in a well rendered decision, reviews many authorities and concludes that the Separate Coach Law of Maryland was invalid as to interstate passengers under the Commerce Clause of the Federal Constitution.

The opinion quotes Mr. Justice Miller of the United States Supreme Court which is as follows (p. 461):

> "In *Railway Company* v. *Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, Justice Miller, after stating that in the cases of *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77; *C. B. & Q. RR.* v. *Iowa*, 94 U. S. 155, 24 L. Ed. 94, and *Peik* v. *Chicago & N. W. R. R. Co.*, 94 U. S. 164, 24 L. Ed. 97, some questions did not receive full consideration, said, in the headnotes prepared by him: 'Notwithstanding what is there said, this court holds now, and has never consciously held otherwise, that a Statute of a State intended to regulate or to tax, or to impose any other restriction upon, the transmission of persons or property or telegraphic messages from one State to another is not within that class of legislation which the States may enact in the absence of legislation by Congress; and that such statutes are void even as to that part of such transmission which may be within the State.' In that case the court quoted at length from the opinion in *Hall* v. *DeCuir*, 95 U. S. 485, to sustain the doctrine announced."

*Hart* v. *State of Maryland*, 100 Md. 595, 60 Atl. 457, is identical with the case at bar.

In *Huff* v. *Norfolk & Southern Ry. Co.*, 88 S. E. 344, 345, 171 N. C. 203 (March 22, 1916), the Supreme Court of North Carolina refused to follow the *Smith* v. *Tenn.*, *supra*, and followed the decisions of the Supreme Court of the United States. Mr. Justice Hoke in delivering the opinion of the court states (p. 205):

> "While there is learned and forcible decision to the contrary, *Smith* v. *Tenn.*, 100 Tenn. 494, it seems to be the trend of opinion and the decided intimation of the Supreme Court of the United States on the

subject that State Legislation of this character may not extend to a case of interstate traffic. *C. & O. R. R.* v. *Ky.*, 179 U. S. 288; *Plessy* v. *Ferguson*, 163 U. S. 537; *Hall* v. *DeCuir*, 95 U. S. 485; *Anderson* v. *L. & N. Ry.*, 62 Fed. 46; *State ex rel. Abbot* v. *Hicks*, 44 La. Criminal."

A careful search of Shepard's S. W. Reporters Citations and Shepard's Southern Reporters Citations fail to disclose that the *Smith* v. *Tenn., supra*, and *Southern Ry. Co.* v. *Norton, supra*, cited by the defendants have been followed or approved. The United States Supreme Court having stated the law in *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 35 S. Ct. 69, 59 L. Ed. 169, by a full court in 1914, which decision must have been overlooked by the Mississippi Supreme Court in 1916, when it decided the *Southern Ry. Co.* v. *Norton, supra*, contrary to the decision of the United States Supreme Court rendered two years previous.

In *Wabash, St. Louis and Pacific Ry. Co.* v. *Illinois*, 118 U. S. 557, 573, 575, 576, 577, this Honorable Court in holding that the exclusive jurisdiction over Interstate Commerce was placed by the Constitution in Congress states:

(p. 573):

"The argument in this subject can never be better stated than it is by Chief-Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, 196. He there demonstrates that commerce among the states like commerce with foreign nations is necessarily commerce which crosses state lines and extends into the states, and the power of Congress to regulate it exists wherever that commerce is found."

(p. 575):

"We must, therefore, hold that it is not and never has been a deliberate opinion of the majority of this

court that a statute or a state which attempts to regulate the fares and charges by a railroad company within its limits for a transportation which constitutes a part of commerce among the states is a valid law."

This doctrine is supported by numerous cases decided by this Court by an unbroken line of decisions.[37]

Repeated decisions of this Court have determined that the power to regulate commerce embraces all the instruments by which such commerce may be conducted; and it is settled law that when the state to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority. Whatever subjects of this power says Mr. Justice Curtiss, are in their nature na-

---

[37] *Gibbons* v. *Ogden*, 9 Wheat. 1, 211; in which Chief Justice Marshall delivered an opinion which has been followed by this Honorable Court to the present time;

*Hall* v. *DeCuir*, 95 U. S. 485, 488, Mr. Chief Justice Waite states: "But we think it may safely be said that the state legislature which seeks to impose a direct burden upon Interstate Commerce or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion occupies that position. It does not act upon the business through the local instruments to be employed after (489) coming within the state, but directly upon the business as it comes into the state from without or goes out from within.

While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage.

His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within and sometimes those taken up and put down without." (See Concurring Opinion by Mr. Justice Clifford—pp. 491, 495, 497.)

tional, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. Mr. Justice Clifford in *Hall* v. *De Cuir*, 95 U. S. 485 at page 497. He cites *Cooley* v. *Board of Wardens*, 12 How. 299.[38]

We believe a further extended argument on this point to be unnecessary as this Honorable Court has recently sustained the doctrine contended for by the appellant, *i. e.*, that state laws are inapplicable to interstate commerce under the condition shown by the record in the case at bar.[39]

### a. A Case in Point.

The United States Circuit Court of Appeals for the District of Columbia has rendered a decision in a case which we believe to be in point. *Washington, B. & A. Electric R. Co.* v. *Waller*, 289 F. 598, 600 (C. C. A. D. C. May 7, 1923).

---

[38] Case of the State Freight Tax, 15 Wall. 232 (82 U. S.), 21 L. Ed. 146. Wherever the ~~states~~ over which the power to regulate commerce is ~~assertion~~, or in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress.

Surely, transportation of passengers or merchandise through a state or from one state to another is of this nature.

See Minn. Rate case 230 U. S. 352, 33 Sup. Ct. 729; 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916 A 18;

*Haskell* v. *Cowham*, 187 Fed. 403, 408, 109 C. C. A. 235, 240;

*West* v. *Kansas, National Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193.

[39] The *U. S. of America* v. *Appalachian Electric Power Co.* Opinion Dec. 16, 1940, No. 12, Oct. Term 1940, S. Ct. of the U. S., *Lewis G. Hines, Secretary of Labor, et al.* v. *Benard Davidowitz, et al.*, Opinion Jan. 20, 1941, No. 22 Oct. Term 1940, U. S. Supreme Ct. See *U. S.* v. *F. W. Darby Lumber Co.* Opinion rendered Feb. 3, 1941, No. 82, Oct. Term 1940.

In *Washington, B. & A. Electric R. Co.* v. *Waller,* 289 Fed. 598, 600 (C. C. A. D. C. May 7, 1923), a colored citizen had purchased a round trip ticket from Washington, D. C., to Annapolis, Maryland, on his return he was ejected by the conductor of the company, who claimed that the Maryland Statute requiring segregation of white and colored passengers applied to an interstate passenger. A judgment recovered in the District Court was affirmed by the Court of Appeals and Mr. Justice Barber in delivering the opinion of the court of appeals states (p. 600):

> "We think that the appellee was an **interstate passenger**, and that the Maryland Statute requiring segregation of white and colored passengers was not applicable to him. *The Daniel Ball,* 10 Wall. 557, 19 L. Ed. 999; *So. Pac. Ry. Co.* v. *I. C. C.,* 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310; *R. R. Comm. of La.* v. *T. & P. Ry. Co.,* 229 U. S. 336, 33 S. Ct. 837, 57 L. Ed. 1215; *Chiles* v. *C. & O. R. R. Co.,* 218 U. S. 71, 30 S. Ct. 667, 54 L. Ed. 936, 20 Ann. Cas. 980; *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23; *Hall* v. *DeCuir,* 95 U. S. 485, 24 L. Ed. 547; *Railway Co.* v. *Mississippi,* 133 U. S. 587, 10 S. Ct. 348, 33 L. Ed. 784.
>
> In *Hart* v. *State of Maryland,* 100 Md. 595, 60 Atl. 457, the court made an exhaustive examination of the authorities, state and federal, and in an able opinion concluded that a Maryland statute apparently enacted prior to the one invoked here, but of similar import, providing for the segregation of white and colored passengers, while valid so far as it affected commerce wholly within the state, was invalid as to **interstate passengers**, as in conflict with that part of Article I, Section 8, of the Constitution of the United States, known as the Commerce Clause."

## II.

### VOLUME OF TRAFFIC.

**The contention by the defendants that the rights of the appellant to first-class accommodations and facilities, during his journey as an interstate passenger, to equal accommodations and facilities furnished all other first-class interstate passengers traveling on the same journey and having paid the same fare as the plaintiff depends upon the volume of traffic is without merit.**

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 161, 162 (1914), 59 L. Ed. 169, 35 S. Ct. 69, this honorable Court conclusively set at rest the contention of all common carriers, subject to the Interstate Commerce Act that volume of traffic determined the kind of service to be rendered interstate passengers and held that the argument with respect to the volume of traffic to be without merit. Contrary to this decision of this Honorable Court the Commission on p. 8, par. 1 of its report (R. 24) states[40]

In view of the undisputed and uncontradicted testimony of Albert W. Jones, the conductor on the Rock Island for 32 years and a witness for the defendant, Rock Island as abstracted (R. 36, 37, 38), it is obvious why he had received little or no requests from citizens of color for first-class

[40] Only about 1 Negro to 20 white passengers rides this train from and to points on the line between Memphis and Hot Springs, and there is hardly ever a demand from a colored passenger for Pullman accommodations; the conductor recalled but 10 or 12 instances, in the past 32 years of his service on the train, wherein colored passengers who had entered Pullman cars were required by him to move into the colored passenger coach. He estimated that the demand for Pullman accommodations did not amount to one per year. What demand there may have been at ticket offices does not appear.

accommodations, although they held first-class tickets and were traveling as interstate passengers. The contention concerning the volume of traffic as the basis for a failure to furnish citizens of color with first-class accommodations in interstate commerce was made by the state of Oklahoma.

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, in which case the Circuit Court of Appeals for the 8th Circuit had sustained the argument concerning the volume of traffic as a basis for the services and accommodations to be rendered interstate passengers of color, (*McCabe* v. *Atchison R. & S. F. Ry. Co.*), it is significant that the section of the Oklahoma Statute under consideration by the Circuit Court of Appeals,[41] is identical with Section 1193 of the Arkansas Separate Coach Law now under consideration by this honorable Court.[42]

Judge Sanborn, one of the Circuit Judges of the 8th Circuit rendered a dissenting opinion (*McCabe* v. *Atchison T. & S. F. Ry. Co.*, 186 F. 966 beginning at p. 977 and ending p. 989), which dissenting opinion we believe to have been adopted by this Court concerning the volume of traffic. In the *McCabe* case, *supra*, the Attorney-General of the State contended that the volume of traffic did not warrant the furnishing by the common carrier, of first-

[41] The Oklahoma Statute, Section 7, is as follows:

"Provided that nothing herein contained shall be construed to prevent Railway companies in this state from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or Negro passengers, separately, but not jointly, Laws 1907-08, c. 15."

[42] Section 1193, Separate Coach Law of Arkansas, Appendix B., pp. 15-17, is as follows:

"Separate Sleeping and Chair Cars.—1193. Carriers may haul sleeping or chair cars for the exclusive use of either the white or African race separately but not jointly."

class accommodations to colored passengers paying first-class fares and traveling in interstate commerce. Mr. Justice Hughes, delivering the opinion of this Court states, pp. 160, 161:

"With the third[43] relating to Sec. 7 of the statute we are unable to agree. It is not the question that the meaning of this clause is that the carriers may provide sleeping cars, dining cars and chair cars exclusively for white persons and *provide no similar accommodations for Negroes.* The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. Thus, the attorney general of the state, in the brief, filed by him in support of the law, urges that 'the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic, or, sufficient profit to justify the furnishing of the facility, and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not, by law, compelled to furnish chair cars, diners nor sleepers, except when the market offered reasonably demands the facility.' And in the brief of counsel for the appellees, it is stated that the members of the legislature 'were undoubtedly familiar with the char-

[43] That the provision of Sec. 7 above quoted, relating to sleeping cars, dining cars and chair cars did not offend against the 14th Amendment as these cars were, comparatively speaking, luxuries, and that it was competent for the legislature to take into consideration the limited demand for such accommodations by the one race, as compared with the demand on the part of the other. *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.,* 151, 160.

acter and extent of travel of persons of African descent in the State of Oklahoma and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the interstate travel' in that state.

*This argument with respect to volume of traffic seems to us to be without merit.* It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, *substantial equality of treatment of persons traveling under like conditions cannot be refused.* It is the individual who is entitled to the equal protection of the laws and if he is denied by a common carrier, acting in the matter under the authority of a state law, the facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler he may properly complain that his constitutional privilege has been invaded."

In view of the undisputed evidence (R. 36, 37, 38) given by the witness Jones on behalf of the Rock Island, clearly showing a course of unjust, undue and unlawful discrimination covering a period of the 32 years he has been in charge of this particular Rock Island train, against American citizens of color traveling as interstate passengers and having paid first-class fares, we are unable to reconcile that part of the report of the Commission, which was approved by the decree of the District Court,[44] in view of

[44] See R. 24, par. 1, Sheet 8 of the report of the Commission.

the decision of this Honorable Court in *McCabe* v. *Atchiso T. & S. F. Ry. Co.*, 235 U. S. 151, 160, 161, which held tha the argument with respect to volume of traffic is witho merit.

This Honorable Court in *Buchanan* v. *Warley*, 245 U. S 60, 74, 75, 76, 77, 78, 79, 80, 38 S. Ct. 16, (1917) denounce the practice of discrimination against American citizen solely on account of race and color and in the decision o this Court delivered by Mr. Justice Day, in holding a ordinance void which discriminated against America citizens of color at p. 74 states (245 U. S. 60):

> "The Federal Constitution and laws passed withi its authority are by the express terms of that instru ment made the supreme law of the land. The Fou teenth Amendment protects life, liberty, and propert from invasion by the states without due process o law."

The opinion reviews the various cases decided by th Supreme Court and the enactment by Congress of law for the protection of the civil rights of persons of colo under the Fourteenth Amendment.

The Court further states (p. 75):

> "Following the Civil War certain amendments t the federal Constitution were adopted, which have become an integral part of that instrument, equally binding upon all the states and fixing certain funda mental rights which all are bound to respect. • • • The Fourteenth Amendment made all persons born or naturalized in the United States citizens of the United States and of the states in which they reside, and provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no state shall deprive any person of life, liberty, or property

without due process of law, nor deny to any person the equal protection of the laws."

(Pages 76, 77):

"The reasons for the adoption of the amendments were elaborately considered by a court familiar with the times in which the necessity for the amendments arose and with the circumstances which impelled their adoption. In that case Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment. * * * It (the Fourteenth Amendment) was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. * * *"

We ask with sincerity if this Honorable Court would say that a white citizen of the United States subjected to the same treatment as the complainant in this case would not be unjustly discriminated against? We further ask if the constitution and the laws made pursuant thereto can be disregarded with impunity.

To further demonstrate the justness of the decision of the Supreme Court in the *McCabe* case, *supra*, we call to the attention of this Honorable Court ~~to~~ a further quotation from *Buchanan* v. *Warley*, *supra*, (p. 77):

"The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks

> in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution."

We do not believe it can be successfully contradicted that, every white citizen holding a first-class ticket is allowed to enjoy the accommodations furnished by the Rock Island Railroad for first-class passengers. They are permitted and invited to enjoy the accomodations of the Pullman car, observation car, parlor car, and dining car upon paying the additional rate. If the Fourteenth Amendment to the Constitution of the United States and the laws made pursuant thereto mean what they say then persons of color are entitled, under like circumstances, to like accommodations and the denial by the common carrier claiming justification for such denial under the excuse that the volume of traffic does not permit it to comply with the plain provisions of the law, conflicts with the Constitution and amounts to unjust discrimination.

The Court in *Buchanan* v. *Warley, supra* further states (p. 78):

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, etc." (Laws of 1870, Chapter 114, Paragraph 16, 16 Stat. 144, Comp. St. 1916, Paragraph 3925.)

In the face of these constitutional and statutory provisions, we contend that no white person could be sub-

jected to the same treatment as was received by the complainant without such conduct on the part of the common carrier amounting to unjust discrimination, undue preference and a violation of his constitutional rights. This being true, then a person of color who is given by law the identical rights of the white person cannot be subjected to the treatment given to the complainant in this case without suffering the same consequences.

In *Buchanan* v. *Warley, supra*, the Court in approving and reaffirming the doctrine laid down in the *McCabe* case, *supra*, at page 80 states:

> "In the recent case of *McCabe* v. *Atchison, etc., Ry. Co.*, 235 U. S. 151 (35 Sup. Ct. 69, 59 L. Ed. 169), where the court had under consideration a statute which allowed railroad companies to furnish dining cars for white people and to refuse to furnish dining cars altogether for colored persons, this language was used in reference to the contentions of the Attorney General: 'This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. * * *"

We believe the Commission and the District Court overlooked the principal provisions of the opinion expressed in the *McCabe* case, *supra*, and further overlooked the fact that the undisputed evidence in the case at bar shows that there are no first-class accommodations provided for colored passengers holding first-class tickets, in the dining car, in the observation-parlor car although such accommodations are furnished to white passengers paying the same fare. This Commission on page 8, Paragraph 2, states that no such first-class accommodations were fur-

nished to colored persons, but on the contrary were denied to colored persons solely on account of their color. This is a plain violation of the Constitution and laws of the United States and is within itself unjust discrimination and undue preference.

On page 8, Paragraph 2 (R. 24) the report states:

> "The present coach properly takes care of colored second-class passengers, and the drawing rooms and compartments in the sleeper provide proper Pullman accommodations for colored first-class passengers, **but there are no dining-car nor observation-parlor car accommodations for the latter and they can not lawfully range through the train.**"

The undisputed evidence in the case at bar shows that white persons traveling in interstate commerce, and holding first-class tickets, are permitted to purchase berths and seats in the Pullman and observation cars, but on the contrary, colored persons holding first-class tickets and traveling as interstate passengers are only permitted to purchase a seat and a berth in the drawing room, if the drawing room is not occupied by white passengers (R. 38). Conductor Jones stated that he had never sold any first-class accommodations and observation-parlor cars to colored passengers (R. 37, 38) although they held first-class tickets. He further stated that he did not permit a colored person to ride in any other place than the jim crow car although adequate space was vacant in (R. 36, 38) the Pullman car and observation car, and that in 32 years he had never permitted a colored person to even occupy a seat in the drawing room, when they applied to him for such accommodations, but removed them to the jim crow car (R. 38).

The doctrine which was so forcibly and clearly expressed by this Honorable Court in the *McCabe* case, *supra*, was

again expressed in State of Missouri, at the relation of *Lloyd Gaines, Petitioner* v. *S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri,* 305 U. S. 337, 350, in which case it was contended that, "the limited demand for the legal education of Negroes was a legal excuse for the discrimination by the State of Missouri in favor of white persons." The Supreme Court adhered to its former holdings, in the *McCabe* case, *supra,* and stated (p. 350):

"Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. We had occasion to consider a cognate question in the case of *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co., supra.* There the argument was advanced, in relation to the provision by a carrier of sleeping cars, dining and chair cars, that the limited demand by negroes justified the State in permitting the furnishing of such accommodations exclusively for white persons. We found that argument to be without merit. It made, we said, the constitutional right 'depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly com-

plain that his constitutional privilege has been invaded.' *Id.*, pp. 161, 162.

> "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the state was bound to furnish him within its borders facilities for legal education substantially equal to those which the state there afforded for persons of the white race, whether or not other negroes sought the same opportunity."

We submit that the decisions of this Honorable Court above discussed clearly showed that the findings of the Commission and the decree of the District Court, in the case at bar do not harmonize with the same. The provisions of the United States Constitution and the laws of Congress above quoted, concerning the equal rights of all citizens of the United States, apparently have been overlooked by the Commission and the District Court.

The Commission on sheet 10 of the report, (Par. 2, R. 26) states:

> "Complainant contends that the extent of the demand for first-class accommodations for colored passengers has no bearing on the question presented."

We submit that the above discussed decisions by this Honorable Court fully sustain the contention of the appellant. It is further contended that the plain provisions of the Supreme law of the land, the Constitution, having declared that "the immunities of citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" (U. S. Const. Art. 4, Sec. 2, Clause 1). We submit that the Commission and District Court were bound by the plain provisions of the Constitution.

The Commission on page 12 of the report (Par. 1, R. 27) states:

> "Defendants say that what the Court evidently meant by this comment was that a carrier could not absolutely refuse to afford colored passengers Pullman accommodations, but had to provide them if there was a reasonable demand for colored passengers."

We have shown by the decisions of the Supreme Court that the right to Pullman accommodations does not depend upon the volume of traffic, but that the right is an individual one, therefore we will not extend this discussion.

The Commission states on page 12 the following:

> "In any event, we are not here considering a Constitutional question, but rather questions of the act."

This statement presents rather a novel situation. All officers of the United States, as we understand, by their oath, to uphold the Constitution of the United States and all laws made pursuant thereto are duty bound to condemn any act whether committed by a state or an individual, contrary to the provisions of the Constitution, without regard to the nature of the proceeding in which the question arises. The very existence of the power and authority of Congress itself is contained in the Constitution (Art. 1, Sec. 8, Clause 3) which gives to Congress exclusive jurisdiction over Interstate Commerce, *Hall* v. *DeCuir*, 95 U. S. 485.

Under this Constitutional power Congress enacted the Interstate Commerce Act by which this Commission derives its power. For the Commission and the District Court to refuse or fail to uphold the Constitution and the plain provisions thereof, leaves the citizens without redress through the administrative governmental agency provided

by law, and we submit that the facts in the case at bar clearly show that the rights guaranteed to citizens of color by the Constitution and the laws of the United States have been denied to a citizen of color and that such denial violates the provisions of the Constitution and amounts to unjust and unlawful discrimination as a matter of law and fact.

The report of the Commission (sheet 12, Par. 2, R. 27), states:

> "Volume of traffic is an important consideration in determining whether certain services demanded are warranted and whether a difference in treatment is justified."

This statement seems to indicate that the Commission, disregarded the decisions of this Honorable,[45] and the District Court in dismissing the petition of the appellant did likewise. This Honorable Court in *Hines, et al.* v. *Davidowitz, et al.*, No. 22, October Term 1940 (Opinion January 20, 1941) states:

> "And it is also of importance that this legislation deals with the rights, liberties and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans."

The conclusion of the Commission that volume of traffic is an important consideration in determining the kind of treatment an American citizen is to receive in interstate

---

[45] *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151, 160, 161; *Buchanan* v. *Warley*, 245 U. S. 60-80; *Gaines* v. *Canada, et al.*, 305 U. S. 337, 350, 351, which hold, that volume of traffic in the transportation of American citizens in interstate commerce is not to be considered.

commerce seems to be in conflict with the basic principles of American jurisprudence.

In *United States* v. *Chicago Heights Trucking Co., et al.*, 310 U. S. 344, 351, 352, (1939) this Honorable Court again sustains the doctrine that, the volume of traffic did not authorize an inequality of treatment on rates for substantially similar services in interstate commerce.

## III.

**The claim by the defendant, Rock Island, that it was attempting to follow the Separate Coach Law of Arkansas and disregard the plain provisions of the Constitution of the United States, and the laws made in pursuance thereof is untenable and the report of the Commission shows its misconception of the law.**

The Commission in its report (R. 27-29) again erroneously assumes that the parties in the case at bar, assumed that the Arkansas statute was applicable to interstate traffic. It would be a rash assumption for any citizen, at this late date, to assume that which the highest court in the land has decided and settled definitely the law as being to the contrary. No citizen can be justified in assuming that the Arkansas statute applied to interstate commerce in view of the unambiguous language used by the Supreme Court in the various decisions above quoted which holds the contrary.

The Commission (R. 28) states:

> "What we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute."

It is respectfully contended that in view of the decisions of the United States Supreme Court, the Constitution of the United States, and the laws made by Congress for the enforcement of the Fourteenth Amendment,[46] that an assumption by a common carrier to comply with a statute of a state which he knew or ought to have known was not applicable to interstate commerce, and where such practice was in violation of the plain provisions of the Constitution would show an utter disregard for the supreme law of the land and the decisions of the highest tribunal. The practice of discrimination against any citizen of the United States, solely on account of color, should be condemned by the Commission. Such practice of discrimination on account of color or race violates the plain provisions of the Interstate Commerce Act, the very act which this Commission was created to enforce, and such discrimination should not be tolerated by any law enforcing agency.

There is no contention by the carriers, in the case at bar, that they were relying upon any such practice as they well knew or ought to have known, that unjust discrimination against a citizen of the United States, solely on account of his color or race, is prohibited by the laws, not only of the United States, but of all God-fearing and liberty loving persons. To permit such practice to continue, as shown by the record in the case at bar, is to reduce to mere words the provisions of the Constitution of the United States, the laws made by Congress prohibiting such practice, and the decisions of the Supreme Court of the United States, which condemned such practice as unjust, unlawful and unAmerican. We do not believe this Court will further permit such discrimination to continue.

---

[46] (Title 8, U.S.C., Secs. 41-43).

*A colored American citizen paying a first class fare and traveling as a passenger in interstate commerce is entitled to any and all first class services, facilities and accommodations which are furnished on the same journey to white citizens paying a first class fare.*

## IV.

### PERSONAL RIGHTS.

**The undisputed and uncontradicted testimony in the record of all witnesses testifying to matters material to the issues involved conclusively shows that the personal constitutional rights of the appellant were ruthlessly violated.**

It is undisputed and all evidence bearing on the question is uncontradicted, that the appellant is an American citizen, member of the Congress of these United States and was a first-class passenger engaged in an interstate journey at the time he was ejected from the first-class accommodations for which he had paid and received during part of his journey. This Honorable Court in *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151 at pp. 161-162 states:

> "It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a State law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may *properly* complain that his constitutional right has been invaded."

In the case at bar the constitutional rights of this citizen were openly violated by the common carrier under

the claim that it was acting in the matter under the authority of the Separate-Coach Law of Arkansas.[47]

In treating this subject, Judge Sanborn in his dissenting opinion states the law, which it is submitted out of justice and fair play to the American citizen of color should be applied in the case at bar.[48]

He further states that no separate chair cars, sleeping cars, or dining cars are required to enable a common carrier, engaged in interstate commerce to give all citizens equal comforts and conveniences of travel (168 Fed. p. 978). He further held that the constitutional rights of citi-

---

[47] See proposed report of Examiner (R. 10-17); report of I. C. C. (R. 18-33). See dissenting opinion of Commissioner Eastman (R. 30), which states:

> "The facts are that white passengers were and are given adequate opportunity to obtain seats, berths, compartments, or rooms in Pullman cars, together with the right to use any dining car or observation car that may be attached to the train, whereas colored passengers have no opportunity to obtain seats or berths in the body of the car or to use dining or observation cars, but may obtain accommodations in a compartment or room, provided one can be found that has not been previously taken by a white passenger. If the conditions were reversed, I cannot believe that the white passenger would regard this as equality and opportunity" (229 I. C. C. p. 712). Evidence of Albert W. Jones, witness for the defendants (R. 36-38).

[48] *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 168 Fed. 966, p. 978:

> "As I understand the fourteenth amendment to the Constitution, the purpose of its enactment, its express terms, and its legal effect are to prohibit the conditioning of the privileges and immunities of citizens and the equal protection of the laws by the respective conditions and circumstances in which citizens may find themselves, and to secure to those suffering under adverse conditions and unfavorable circumstances the same civil rights and the same protection of the laws

zens to their privileges and immunities and to the equal protection of the laws are not dependent upon the expense and inconvenience of maintaining separate coaches and compartments for the two races although such items are worthy of serious consideration by the States when enacting laws compelling railroads to provide separate coaches (p. 978). He further illustrates how unjust and un-American it is to deny citizens of color the equal accommodations and facilities furnished to white citizens in the use of dining cars and sleeping cars.

## IV-A.

### Personal rights include personal liberty.

"Personal Liberty" constitutes any power of locomotion of changing situation or removing one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. 1 Bl. Com. 134, *Plessy* v. *Ferguson*, 163 U. S. 537. (Dissenting Opinion, Mr. Justice Harlan, p. 557:) The equal protection of the laws as used in the Fourteenth Amendment to the Constitution of the United States, is meant equal security under the laws to everyone in similar terms —in his life, his liberty, his property and in the pursuit

---

that the more fortunate and prosperous enjoy. Citizenship and citizenship alone, under this amendment to the Constitution, entitles every man, white or black, to all his civil rights and privileges unabridged by the action or legislation of any state and to the equal protection of all the laws. Before the law, by the express terms of the fourteenth amendment, all citizens are equal in their civil rights, and the humblest is the peer of the most powerful. It regards a citizen as a citizen, and takes no account of his surroundings or of his color when his civil rights, as guaranteed by this the Supreme law of the land, are involved."

of happiness. *In Re Grice,* 79 F. 627, 628, in which case it is also held (p. 641), that one of the most sacred rights of liberty is the right of contract, and that all of the rights of contract which are necessary for the carrying on of ordinary business affairs are protected by the Constitution of the United States and that such sacred rights are not capable of being restrained by legislative action of any state (Fourteenth Amendment, United States Constitution), nor by any person claiming to act under color of any law of the state (Title 8, U. S. C. Chap. 3, Secs. 41 & 43). It was further held in the *Grice* case, *supra* that a man may form business relations with whom he pleases and in the conduct of such business, they may fix and limit the character and amount of their business, the price they will charge for the products which they offer to the public, or by which they contract. And it is part of the natural and civil liberty to form business relations free from the dictation of the state. It was further held in the *Grice* case, *supra,* that whatever the state does, it cannot deprive one within its jurisdiction of the equal protection of the laws and by equal protection of laws, is meant equal security under them, under similar terms in the citizen's life, liberty, property and in the pursuit of happiness. It not only implies the right of each citizen to resort, in similar terms with others, to the courts of the country for the security of his person, and property, for the redress of wrongs against him and the enforcement of his contracts, but also his exemption from any greater burden and charges within the state as are equally imposed upon all other citizens under like circumstances. *In Re Grice,* 79 F. 627.

All American citizens, whether white or colored, are entitled to equality before the law. This equality is secured by the Constitution of the United States and the

laws made by Congress in pursuance thereof and the subject of equality before the law, is the fundamental principle of English and American liberty.[49]

## V.

**Personal rights include the equal protection of the laws and the right to contract for first-class services, accommodations and facilities in Interstate Commerce and further includes the right to enforce the contract in the event of its violation by the common carrier.**

In the event this Honorable Court should decide that American citizens of color, travelling in Interstate Commerce as first class passengers, may be denied the first class accommodations and facilities furnished to all other white citizens, by the carriers who are engaged in the same continuous interstate journey, solely on account of race or color, then we urge that it is the duty imposed upon the common carrier to furnish to the citizen of color, first class facilities, accommodations and services, equal to those furnished the white American citizens who have paid the same first class fare as the colored citizen.

In *Hall* v. *De Cuir*, 94 U. S. 485, 24 L. Ed. 547 (1887), the doctrine, then announced has been followed by this

---

[49] *In Re Grice*, 79 F. 627, 645, the Court states:

"The subject of equality before the law is a fundamental principle of English and American liberty, it not only has been made sacred in all later day Constitutions, State and Federal, but the principle has been carried with jealous watchfulness, to see that the citizens may have guaranteed to them this inestimable privilege and condition. *Barbier* v. *Connolly*, 113 U. S. 27, 5 S. Ct. 357; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064; *Dent* v. *West Virginia*, 129 U. S. 114, 9 S. Ct. 231; *Ex Parte Virginia*, 100 U. S. 339; *Duncan* v. *Missouri*, 152 U. S. 382, 14 S. Ct. 570."

Honorable Court and all other Courts who have adhered to the Constitution and laws made for the protection of the rights of all American citizens. This doctrine may be stated as follows. All common carriers of passengers for hire are bound, if they have suitable accommodations, to take all persons who apply, unless there is objection to the character or conduct of the applicant. And when an applicant to whom there is no valid objection, applies for passage, he has a right to receive it. (*Hall* v. *De Cuir*, p. 501.) It is further held that a passenger has a right to require such accommodations as he has contracted for (p. 405).

It is not disputed that the appellant on April 20, 1937, contracted for first class accommodations from Chicago to Hot Springs, Arkansas (R. 70); that he received the class of accommodations for more than one-half of the interstate journey, and that upon leaving Memphis, Tennessee, he arriving at a point in the State of Arkansas, between Memphis and Hot Springs (R. 79), he was ejected from the first class accommodations by the conductor of the Rock Island, solely on account of his color (R. 79, 80, 81), and was compelled to ride in a car known as the "Jim Crow Car" (R. 81) which was used for citizens of color, who had only paid a less rate of fare and admitted to be second class accommodations, inferior to the first class accommodations which all other white citizens were permitted to use and occupy throughout the interstate journey. The conductor who received the first class ticket from the appellant, admitted that the appellant under the terms of his contract of carriage, was entitled to first class accommodations, but under the law of the State of Arkansas, the appellant could not continue to receive the first class accommodations to the end of his interstate journey (R. 81). A description of this "Jim Crow Car," in which appellant was compelled to ride is found (R. 82, 83, 84,

133, 134, 135, 165, 166, 167, 168). Description of the first class car from which the appellant was ejected, is found (R. 77, 78, 86, 90, 164, 165, 168), and repetition of the description will be avoided.

An abstract of the testimony of the Conductor Jones, is found (R. 36-38), and we believe the mere reading of this undisputed and uncontradicted testimony of Mr. Jones, who had charge of the Rock Island train for thirty-two years, will convince this Honorable Court that the Constitutional rights of the appellant had been violated in the manner described in his complaint and that the sole ground claimed for the unjust discrimination against this American Citizen, the appellant, by the common carrier, is that the appellant is a colored American citizen.[50]

Various cases involving the rights of American citizens of color to the equal protection of the laws have been decided by the Interstate Commerce Commission (R. 31).[51]

In the various cases heretofore decided by the Interstate Commerce Commission, it may be safely said that the fundamental principles of law enunciated by the Commission in each of the cases are as follows:

1. That colored people who buy first-class tickets to travel as interstate passengers must be furnished with

---

[50] For the convenience of the Court, we have printed the abstract of the evidence of all witnesses as contained in the initial brief of the appellant filed with the Interstate Commerce Commission (Appendix C, pp. 19-50), contained in a separate volume filed with this brief.

[51] *Councill* v. *Western and Atlantic R. R. Co.*, 1 I. C. C. 339, *Heard* v. *Georgia R. R. Co.*, 1 I. C. C. 428, *Edwards* v. *Nashville, Chattanooga and St. Louis Ry. Co.*, 12 I. C. C. 247. In each of these cases, the Commission entered a cease and desist order. The *Councill* and *Heard* cases are almost identical with the case at bar.

accommodations equally safe and comfortable with all other first-class interstate passengers.

2. Where a colored person pays a first-class fare on an interstate journey and he is compelled to occupy inferior and second-class accommodations of a Jim Crow car that he has been subjected to undue and unreasonable prejudice in violation of the Interstate Commerce Act and has been denied his constitutional rights of equal protection of the laws.

3. That it is the lawful duty which the common carrier engaged in interstate travel owes to the traveling public to furnish accommodations equal in comfort, accommodation and equipment without and discrimination where the same price is paid.

4. That the law, federal and state will not tolerate the doctrine any more in the transportation of persons than of property, viz: That one class is to be favored by the carrier over another when both have contracted and paid for the same kind of service, accommodations and facilities.

5. That all persons have the lawful right to purchase first- or second-class accommodations and if the carrier sells none but first-class accommodations he must give first-class services to the purchaser engaged in an interstate journey as such first-class passenger.

6. That there is no equality of rights, when the money of the white citizen purchases luxurious accommodations amid elegant company, and the same amount of money purchases for the black American citizen inferior quarters.

7. That all American citizens, black and white, now stand upon equal footing before the law and that any discrimination based upon color or race alone to which an

interstate passenger is subjected, not only violates the Constitution[52] and the laws enacted under it,[53] but is at war with our basic concepts of a democratic society and a representative government.[54]

The following cases fully support the contention of the appellant: *Heard* v. *Georgia Ry. Co.*, 1 I. C. C. 428, 429, 430, 431, 432, 433, 435, 436; *Heard* v. *Georgia R. R. Co.*, 3 I. C. C. 111, 116, 117, 118; *Councill* v. *Western & A. Ry. Co.*, 1 I. C. C. 339, 346, 347; *Edwards* v. *Nashville Chat. & St. L. Ry. Co.*, 12 I. C. C. 247, 250; *Brown* v. *Memphis & C. R. Co.*, 5 Fed. 499.

The following Federal cases also support the above propositions stated: *Gray* v. *Cincinnati Ry. Co.*, 11 F. 683, 686; *Murphy* v. *Western & A. R. R. Co.*, 23 F. 637, 639, 640; *Logwood and Wife* v. *Memphis & C. Ry.*, 23 F. 318, 319; *The Sue*, 23 F. 843, 844, 845, 846, 848.

It is respectfully contended that on the undisputed evidence appearing in the record that the District Court and the Interstate Commerce Commission have failed to follow the established principles of law.

---

[52] Article IV, Sec. 2, Cl. 1, United States Constitution, Appendix A, p. 12; Fourteenth Amendment, Sec. 1, Appendix A, p. 2.

[53] Title 8 U. S. C. Ch. 3, Sec. 41—Civil Rights, Appendix A, p. 1; Title 8 U. S. C., Ch. 3, Sec. 43—Civil Rights, Appendix A, p. 2; Title 49 U. S. C. Sec. 1 (5), Appendix A, p. 7; Sec. 2, Sec. 3 (1), Appendix A, p. 8.

[54] *Edgar Smith* v. *State of Texas*, Opp. Nov. 25, 1940, No. 33, Oct. Term 1940, United States Supreme Court, Opp. 2.

## VI.

**The Interstate Commerce Act contains a national comprehensive system for the regulation of Interstate Commerce which excludes the application of the local Separate Coach Law of the States.**

Under the provision of the Constitution above set forth Congress was given exclusive jurisdiction of Interstate Commerce. Under its Constitutional power the "Interstate Commerce Act" was passed in 1887. Congress by the passage of this act has done no more than to regulate all interstate business of carriers and the primary purpose for which this Commission was established, was to enforce the regulations imposed by Congress. *Harriman* v. *Interstate Commerce Commission* (N. Y. 1908), 29 S. Ct. 115, 118, 211, U. S. 407, 418, 53 L. Ed. 253. The Chief purpose of the act to regulate commerce and its amendments was to prevent unjust preferences and undue discriminations and to secure uniformity of rates and service. *Denver & R. G. R. Co.* v. *Baer Bros. Mercantile Co.*, 187 F. 485, 109 C. C. A. 337 (Reversed on other grounds, 1914, 34 S. Ct. 641, 233 U. S. 479, 58 Law Edition 1055), *Interstate Commerce Commission* v. *Cincinnati, N. O. & Tex. Pac. Ry. Co.*, 167 U. S. 479, 17 S. Ct. 896, 42 L. Ed. 243, *Tex & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439, 27 S. Ct. 350, 51 L. Ed. 553.

In the language of Circuit Judge Sanborn in *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 186 Fed. 966, 977:

> "if each of two citizens of unobjectionable mental, moral, and physical character, one a white man and the other a colored man, tenders and pays to one of the defendants Railway Companies that is operating its trains, chair cars, sleeping cars and dining cars the same, lawful rate for his transportation between the

same places in a chair car, or in a sleeping car, and for the customary use of a dining car on his journey, and the white man is furnished by the company with his ride in a chair car, or in a sleeping car, and with his dinner in the dining car, and the Railroad Company claiming authority under a state separate coach law, solely by reason of his color, prevents the colored citizen from riding in or using all of those cars and all other cars of a similar character, ejects him from any such car into which he enters, and refuses to carry him at all unless he ride in an ordinary coach, is the colored citizen accorded 'the equal protection of the laws' enjoyed by the white man and the unabridged privileges and immunities of citizenship as guaranteed by the Constitution of the United States and the laws made pursuant thereto and the uniformity of service as provided for in the Interstate Commerce Act?''

We submit that this question seems to bear its own answer and the facts contained therein are identical with the facts in the case at bar and unjust purpose and undue discrimination by such conduct, we submit, is clearly shown.

Since the original act to regulate commerce in 1887 Congress by repeated enactments has endeavored to control the whole field of Interstate Commerce and to regulate all relations between shippers, passengers, and carriers, so as to secure uniformity throughout the country and the Interstate Commerce Act must be construed to give the effect intended by Congress. *Hartness* v. *Iberia, etc., R. Co.* (D. C. La. 1924), 297 Fed. 622, 624, *Johnson* v. *Southern Pac. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363.

Congress having exercised its control over the whole field of Interstate Commerce, we must look to the laws pertaining thereto for any right claimed by a common

carrier to discriminate against a passenger solely on account of his color. There is no law or regulation authorizing a common carrier to make such discrimination but on the contrary Congress well knew that the Constitution of the United States, and in particular the Fourteenth Amendment thereto, prohibited any discrimination against a citizen of the United States by a common carrier operating under the Interstate Commerce Act.

Mr. Justice Shiras, in *Tex. & Pac. Ry.* v. *Interstate Commerce Commission* (N. Y. 1896), 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, fully discusses the causes and reasons which lead to the enactment of the Interstate Commerce Act at page 209 states:

> "The act to regulate commerce will be examined in vain to find any intimation that there shall be any difference made in the tolls rates or charges for or any difference in the treatment of home and foreign merchandise in respect to the same or similar service rendered in the transportation, when this transportation is done under the operation of this statute. Certainly it would require a proviso or exception plainly engrafted upon the face of the act to regulate commerce, before any tribunal charged with its administration would be authorized to decide or hold that foreign merchandise was entitled to any preference in tolls, rates or charges made for, or any difference in its treatment for the same or similar service as against home merchandise. Foreign and home merchandise, therefore, under the operation of this statute, when handled and transported by Interstate carriers, engaged in carriage of the United States, *stand exactly upon the same basis of equality* as to tolls, rates, charges *and treatment for similar services rendered.*"

It is to be remembered that the case at bar involves the rights of a citizen of the United States traveling in Interstate Commerce to the equal protection of the law guaranteed by the Constitution of the United States and from unjust discrimination, prohibited by the Constitution and the laws of the United States. Congress having covered the entire field of Interstate traffic in passengers and property, did not see fit to provide for any discrimination of any citizen of the United States on account of color alone but on the contrary by Section 2 of the act specifically forbids and prohibits unjust discrimination by common carriers. No state or individual can make any laws, rules or regulations in conflict with those provided by the Interstate Commerce Act and Common Carriers engaged in the transportation of passengers and property under the act must conform to the judgment of Congress. *Lehigh Valley R. Co.* v. *Public Service Commission,* Second Dist. of the State of N. Y. (D. C. N. Y. 1921), 272 Fed. 758, Aff'd (1922) 42 S. Ct. 239, 257, U. S. 591, 66 L. Ed. 385.

Under the undisputed facts which show that the complainant was discriminated against solely on account of his race and color, while traveling as a first-class passenger, in Interstate Commerce, we submit that under the plain provision of the law, applicable alike to white and black citizens, unjust discrimination is clearly shown in the case at bar.

The problem of the regulation of interstate commerce is plainly national in area and dimensions. Moreover, laws of the separate states can not deal with it effectively and Congress having enacted the Interstate Commerce Act[55] all questions of the regulation of interstate commerce is

[55]Title 49 U. S. C. Secs. 1-156.

fully covered therein and can not be increased nor diminished by state action.[56]

It is urged that the principle contended for by the appellant is so well grounded in the decisions of this Honorable Court that lengthy discussion will not be necessary.

This Honorable Court in a very recent case, *Hines, et al.* v. *Davidowitz, et al.*, Opinion January 20, 1941, No. 22, Oct. Term 1940, sustains the contention of the appellant, that all separate car laws of the various states yielded to the Interstate Commerce Act which is a comprehensive intergraded scheme for the regulation of commerce, and at page 5 of the Opinion, Mr. Justice Black states:

"When the national government by treaty or statute has established rules and regulations touching the

---

[56]*Texas & Pac. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 211, 212, p. 211:

"The scope or purpose of the act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the act, but reasonable to anticipate that the legislation would cover, or have regard to the entire field of interstate commerce, and that its scheme or regulation would not be restricted to a partial treatment of the subject."

See Case of the State Freight Tax, 13 Wall (82 U. S.) 232, which supports the national system doctrine. *Haskell* v. *Cowhan*, 187 Fed. 403, 408. *U. S.* v. *F. W. Darby Lumber Company, et al.*, 82 Oct. Term 1940, Opinion February 3, 1941, U. S. Supreme Court, which holds:

"The power to regulate commerce is the power 'to prescribe the rules by which commerce is governed.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect commerce, but embraces those which prohibit it. (Cases cited.) * * * The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed by the Constitution.' "

rights, privileges and obligations or burdens of aliens as such, the treaty is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute, for Article VI of the Constitution provides that 'this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.' "

The Commerce Clause of the Constitution[57] forbids discrimination whether forthright or ingenious and in every case it is the duty of this Honorable Court to determine whether a statute or practice, under attack, whatever its name may be, will in its practical operation work discrimination against citizens traveling as interstate passengers in interstate commerce.

---

[57] Article I, Sec. 8, Cl. 3, United States Constitution.

## VII.

**Congress has prohibited discrimination, undue prejudice, unreasonable and undue advantage and preference in relation to citizens traveling as interstate passengers.**

The prohibitions contained in the Enforcement Acts[58] passed by Congress in 1866 and 1870, prohibiting the deprivation of any citizen of the United States of any rights, privileges or immunities secured by the Constitution and laws of the United States is evidence of the policy of the United States towards all citizens.

The plain language of the above quoted section clearly demonstrates that Congress intended that no discrimination, unreasonable and undue advantage should be taken or shown against any citizen, solely on account of the race, color or creed of the citizen. It is to be noted that the last mentioned section applies to *every person*. It also prohibits as a defense, a claim by the offender, as an excuse

---

[58]Title 8, U. S. C., Cha. 3, Sec. 41 and 43—Civil Rights.

Section 41. Equal rights under the law. *All persons* within the jurisdiction of the United States shall have the same right *in every State* and Territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, and penalties, taxes, licenses, and exactions of every kind, and to no other. (R. S. par. 1977).

Section 43. Civil action for deprivation of rights. Every *person* who, under color of any statute, * * * *regulation, custom*, or *usage*, of any State or Territory, subjects, or causes to be subjected, *any citizen* of the United States or *other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit *in equity*, or *other proper proceeding for redress*. (R. S. par. 1979).

for discrimination, any *regulation, custom or usage,* etc. It not only provides that the injured party may proceed by an action *at law or suit in equity,* but it provides that the injured party may seek redress *"by other proper proceedings."*

Congress did not content itself with the provisions of the Enforcement Acts in order to prohibit discrimination, undue prejudice, unreasonable and undue advantage and preference against any citizen or person within the jurisdiction of the United States but to further protect every citizen in the enjoyment and exercise of their civil rights enacted the Interstate Commerce Act of 1887.[59] The Commerce Act again prohibited all persons operating in Interstate Commerce, as common carriers, from the practice of discrimination against, not only persons traveling as interstate passengers but against shippers of goods in interstate commerce. It further prohibited unjust discrimination, undue and unreasonable prejudices, undue advantage and preference and further prohibited interstate carriers from charging different rates for the same services rendered.[60]

[59]Title 49, U. S. C. Secs. 1-156.

[60]Title 49, U. S. C. Secs. 1 (1) (2) (5), 2, 3 (1), 13 (1) (4).

## VIII.

**The appellant having suffered direct injury to his rights guaranteed by the Constitution of the United States and laws made pursuant thereof has the absolute right to prosecute these proceedings.**

Some question has been raised as to the right of the plaintiff to apply for a cease and desist order upon the facts alleged in his complaint filed with the Interstate Commerce Commission.

It is submitted that the ruling of the Commission on this point sustains the appellant's right to prosecute these proceedings (R. 19-20). No exceptions were filed to the report of the Commission by any of the defendants who were parties thereto.

This Honorable Court has sustained the right of the plaintiff in numerous cases.[61]

---

[61] *Truax* v. *Raich*, 239 U. S. 33, 38, which holds that where the plaintiff's rights are directly involved he is a proper party to seek redress, and that where a party seeks to enforce a contract on the ground that as a citizen of the United States, he has the same rights as all white citizens (Enforcement Act, Title 8, Sec. 41-43, Fourteenth Amendment of the United States Constitution, Art. 4, Sec. 2, Cl. 1, United States Constitution); *Buchanan* v. *Warley*, 245 U. S. 60, 73, "This case does not come within the class wherein this Court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved." (See *Truax* v. *Raich*, 239 U. S. 33, 38).

The appellant, an American citizen, had contracted and paid for first-class accommodations and facilities for an interstate journey from Chicago to Hot Springs. He was denied equality of treatment as an interstate first-class passenger in that other first-class passengers who had paid a similar fare for first-class accommodations were furnished such first-class accommodations throughout the entire journey. The appellant was compelled by the Rock Island to ride in a jim crow car containing only second-class accommodations, for part of his journey. This inequality of treatment gave to the appellant the undoubted right to apply for redress to the Interstate Commerce Commission.[62] It is unnecessary to labor the point.

## IX.

### What is unjust discrimination prohibited by the Interstate Commerce Act?

The uncontradicted and indisputable evidence in the case at bar clearly shows that the appellant is a native-born American citizen, that he had purchased a first-class round trip ticket from Chicago to Hot Springs (R. 70-71); that he paid the regular first-class fare for the ticket (R. 70); had been received by the defendants as a first-class interstate passenger (R. 70); his ticket had been collected by the conductor on the Rock Island (R. 79), while he was occupying first-class accommodations the same as all other

---

[62]Title 49, Sec. 13. The Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 320, in which case this Court states:

> "It is injury inflicted by denying to the plaintiff equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper." *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 35 S. Ct. 370, 59 L. Ed. 616.

first-class passengers engaged in this interstate journey and who had paid a similar fare for the first-class service.

That solely on account of his color he was ejected from the first-class accommodations before he had completed his journey (Abst. 79), and compelled to ride in a car containing only second-class accommodations for which the charges were less than the first-class fares. The description of the jim crow car in comparison with the first-class accommodations of the Pullman and observation cars have heretofore been referred to.

To charge one person more than another for the same accommodations is unjust discrimination, *United States* v. *Chicago Heights Trucking Company,* 310 U. S. 344, 351, 353; 60 S. Ct. 931, 84 L. Ed. 1243, and violates Sec. 2 of the Interstate Commerce Act.

To charge one interstate passenger a greater or less compensation for any service rendered or to be rendered in the transportation of property or passengers than is charged any other person for doing a like and contemporaneous service in the interstate transportation of a like kind under substantially similar circumstances and conditions violates Secs. 2 and 3 of the Interstate Commerce Act. (Appendix A, p. 8 and Sec. 1, par. 5 of the Interstate Commerce Act, Appendix A, p. 7.) It was the duty of the Commission, upon the undisputed facts as shown by the evidence of all witnesses (Appendix C, pp. 19-50) to have entered a cease and desist order (Sec. 15 (1), Interstate Commerce Act, Appendix A, p. 10), and failing to do its duty the District Court should have set aside the order of dismissal (Title 28, U.S.C. 41 (28), Appendix A, p. 2).

The uncontradicted and undisputed evidence clearly shows that the allegations in the complaint had been fully sustained.

## X.

**Custom does not justify continued unjust discrimination.**

Custom cannot override the law and a failure to enforce the law does not change it. The good faith of the carrier in the transactions of the past may be unquestioned, but that does not justify a continuance of a practice which violates the Interstate Commerce Act. *American Express Company* v. *United States,* 212 U. S. 522, 523, 529; 29 S. Ct. 315; *Merchants Warehouse Company Case,* 283 U. S. 501, 511, 512.

We do not believe it necessary to do other than to state that if this Honorable Court shall find that the discrimination practiced by the Rock Island against an interstate passenger, solely on account of his race or color, has existed for the past 32 years as stated by the conductor Jones in his testimony before the Commission (R. 36-38), (Appendix C, pp. 41, 44, 45, 46, 48), then we respectfully urge that the above proposition of law be followed.

## XI

**Erroneous holding of the Commission concerning the right of the appellant to purchase and use first-class accommodations in Interstate Commerce.**

The Commission states (R. 28):

> "Complainant urges that collection of the first-class fare, notwithstanding the fact that second-class accommodations were furnished him, was violative of sections 1, 2, 3, and 6 of the act; also of the Fourteenth Amendment, on the ground that he was deprived of money without due process of law and denied equal protection of the laws. It is sufficient to say that a

first-class ticket was furnished and charged for because complainant wanted it, and that after it developed that the first-class accommodations ordinarily available for colored passengers west of Memphis were all taken by other passengers defendants offered to refund the difference. Moreover, as already stated, complainant is here seeking no relief from the charges paid."

It is conceded that the complainant is a native born American citizen; that he had contracted and paid for first-class accommodations; that he was traveling on a common carrier engaged in interstate commerce, and that he was an interstate passenger. It is further conceded, that he received the same first-class services which were given to all other first-class passengers, for only a part of the journey; that he was denied first-class services for the remainder of his journey, solely on account of his color (R. 36-39), although such services were furnished to all other interstate passengers on this journey who were white persons. The Constitution of the United States, the laws made in conformity therewith and the provisions of the Interstate Commerce Act, prohibit discrimination against citizens of the United States, solely on account of their race or color. We can not conceive that the Commission would limit the right of a white citizen in selecting to travel as a first-class passenger on an interstate journey, and that if the complainant was a white person, member of the Congress of the United States, and had received the identical treatment received by the complainant in the case at bar, solely on account of color, we do not believe that the Commission would find that no unjust discrimination existed, and that a common carrier was justified by such conduct.

The conductor frankly stated that he would not permit a colored man to occupy the first-class accommodations on

his train (R. 38, 172), and that for 32 years the Rock Island had failed to provide first-class accommodations for citizens of the United States, solely on account of their color (R. 36, 159). We believe no white American citizen with red blood in his veins with a knowledge of the provisions of the Constitution, and the laws of Congress, with respect for the decisions of the Supreme Court of the United States, would condone the unchristian and un-American conduct, as shown by the record in this case, as having been perpetrated against the complainant.

We believe it is well and fitting to quote from the language of Circuit Judge Sanborn, in his dissenting opinion in *McCabe* v. *Atchison, Topeka & Sana Fe Ry.* (186 F. 966, 983):

> "The true interpretation of the Fourteenth Amendment is to be found in the decisions of the Supreme Court when it was composed of those great jurists who had been active in public affairs when it was proposed and enacted and who could not fail to know its purpose and its meaning. In *Strauder* v. *West Virginia,* 100 U. S 303, 306, 25 L. Ed. 664, that court said:
>
> 'This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoyed. * * * They especially needed protection against unfriendly action in the states where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It

not only gave citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws and authorized Congress to enforce its provisions by appropriate legislation. * * * It ordains that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that a law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and, in regard to the colored race for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored—exemption from legal discrimination implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy and discriminations which are steps towards reducing them to the condition of a subject race.' "

We submit that this interpretation of the Fourteenth Amendment, above referred to, needs no argument to show that the civil rights of both white and black American citizens are equal, and that any treatment of a black citizen which denies to him such equal rights, is discriminatory, and prohibited by law.

## XII

**Refund of Money Is Not Adequate Redress for the Wrongful Exclusion by a Common Carrier of an American Citizen Engaged in An Interstate Journey As a First-Class Passenger.**

In the case at bar the undisputed and uncontradicted testimony of all witnesses shows that the appellant was engaged on a continuous interstate journey from Chicago to Hot Springs as a first-class passenger and that he was ejected from the first-class accommodations and facilities which he occupied during a portion of his interstate journey (R. 36, 37, 38).[63] The appellant by these proceedings, is seeking a cease and desist order for the purpose of prohibiting a continuance of the pernicious practice of discrimination in interstate commerce against an American citizen, solely on account of his race or color.

In *Brown* v. *Memphis & C. Ry. Co.*, 7 Fed. 51, 63 (C. C. Tenn.), the Circuit Court in a passing upon the proposition of law above stated holds that mere refund of money is not adequate redress.[64] In the same case the Court held

---

[63] The condensed testimony of Albert W. Jones, conductor on the Rock Island for 32 years and a witness for the defendants.

[64] *Brown* v. *Memphis & C. Ry. Co.*, 7 Fed. 51, 63:

> "The mere price of a ticket, or refunding of the money, will not answer the purpose in all cases; that would be simply to permit the carrier to enforce the unreasonable regulations, because he should never claim to keep the money *while refusing to render the service. He would take no money or refund all received, and go on with his business in his own way,* and the plaintiff or the public would be no better off. In *Pearson* v. *Daune,* 4 Wall 605, a captain put off a passenger from a humane motive to save his life—the exclusion was held *wrongful* although the passenger had no money of his own and had paid for no ticket."

(p. 64) that the wrongful exclusion is an act against the public.

The mere refund offered to the plaintiff is not adequate redress and we believe that this Honorable Court will take judicial notice of the unjust discrimination practices by various common carriers against American citizens traveling as first-class passengers in interstate commerce, because such practice is a matter of common knowledge.

## XIII

### Judicial Notice.

In *United States ex rel Weinberg* v. *Scholtfeldt, etc.*, 26 F. Supp. 283, 284, states:

> "It is a matter of common knowledge that at the present time in Central Europe the jews are being persecuted and property confiscated and that they are obliged to seek sanctuary in other countries."

If the Federal Courts can take judicial notice of the persecution of human beings in Central Europe we believe it to be a fair request that this Honorable Court take judicial notice that American citizens of color traveling in interstate commerce as first-class passengers are unjustly discriminated against by certain common carriers in certain sections of the United States, solely on account of their race and color. In view of the legal status of all American citizens of color under the Constitution and the laws made in pursuance thereof,[65] and the decisions of this

---

[65] United States Constitution, Fourteenth Amendment, Art. 4, Sec. 2, Cl. 1, United States Constitution, Title 8, U. S. C. Ch. 3, Sec. 41-43.

Honorable Court,[66] and other Federal Courts we believe that the time has now arrived for this Honorable Court to hold, that all American citizens, black and white, traveling in interstate commerce cannot be affected in the kind of service, accommodations and facilities they are to receive by the Separate-Coach Laws of the several States.

In *Ohio Bell Telephone Co.* v. *Public Utilities Co. of Ohio,* 301 U. S. 292, 301, this Court states:

> "Courts take judicial notice of matters of common knowledge." 5 Wigmore Evidence, Pars. 2571, 2580, 2583; Thayer Preliminary Treatise on Evidence, pp. 277, 301. "They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants (citing cases)."

## XIV

### Questions Not Involved in This Appeal.

In order that the issues involved in the case at bar may not be confused we wish to state:

1. That the constitutionality of the separate-coach law of Arkansas has not been attacked in this proceeding but only its unconstitutional application by the Commission on the claim of the defendant Rock Island, as shown by the uncontradicted and undisputed testimony of its witness Jones, that he was not acting under any rules or regulations promulgated by the Rock Island but, as the conductor of the train and in charge of its operation on behalf of the Rock Island, he was acting under cover of the Arkansas Separate-Coach Law (R. 178).

---

[66] *Strauder* v. *West Virginia,* 100 U. S. 303, 306, 25 L. Ed. 664; *McCabe* v. *Atchison T. & S. F. Ry. Co.,* 235 U. S. 151, 162, 186 Fed. 966, (see dissenting opinion Circuit Judge Sanborn, 977-989).

We do not concede that the Separate-Coach Law is constitutional but for the purpose of this appeal we are not drawing into question its validity.

2. We are not asking this Court to consider the weight of conflicting evidence nor the wisdom of the order entered by the Commission. Such request, we know, would be unavailing under the decisions of this Court,[67] nor to substitute its judgment on conflicting evidence for that of the Interstate Commerce Commission on matters purely administrative,[68] nor to consider the credibility of witnesses.[69]

In the case at bar the undisputed and uncontradicted testimony of all of the witnesses, on the main issues involved conclusively shows that there is no conflict of evidence therefore the main question presented by this appeal involves the application of the law to the facts.

---

[67] New England Divisions Case, 261 U. S. 184, 204; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457; *Skinner & Eddie Corp.* v. *United States,* 249 U. S. 557, 562; *Seaboard Airline Ry. Co.* v. *United States,* 254 U. S. 57, 62.

[68] *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482; *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361.

[69] *Merchants Warehouse Co.* v. *United States, et al.,* 283 U. S. 501, 508.

## XV.

**The order of the Interstate Commerce Commission and the decree of the District Court should be reviewed by this court and set aside.**

The constitutional rights of the appellant were claimed to have been violated on his interstate journey (R. 3-7), and this Court in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 459, holds that in matters involving constitutional rights the orders of the commission are not conclusive.

### A.

The order of the Interstate Commerce Commission is void because it rests upon an erroneous application of the rules of law:

1. That the Separate Coach Law of Arkansas applied to Interstate Commerce.
2. That the volume of traffic was to be taken into consideration in deciding whether or not a citizen had been discriminated against solely on account of his color and denied first-class accommodations on an interstate journey for which he had paid.
3. In holding that the constitutional rights of the appellant were not involved.
4. In failing to follow the decision of this Honorable Court in *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151.
5. In holding that the carrier was justified in assuming to follow the Separate Coach Law of Arkansas instead of the Constitution of the United States and laws made in pursuance thereto, which have

been declared to be the Supreme Law of the Land. (Art. VI, Cl. 2, United States Constitution, (Appendix A. p. 12).)

The above holdings are supported by *Interstate Commerce Commission* v. *Diffenbaugh,* 242 U. S. 42; *Rochester Telephone Company* v. *United States, et al.,* 307 U. S. 125, 130, 135.

**B.**

The order of the commission is based upon a finding made without any evidence to support it and the District Court should have set the same aside, *Interstate Commerce Commission* v. *Union Pacific R. R. Company,* 222 U. S. 541, 547; *Chicago Junction Case,* 264 U. S. 258, 263; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Company,* 227 U. S. 88, 91; *Florida East Coast Ry. Company* v. *United States,* 234 U. S. 167; *Baltimore & Ohio R. R. Company* v. *United States,* 277 U. S. 291, 300, 301, and numerous cases heretofore decided by this Honorable Court.

The evidence of conductor Jones, a witness for the defendants and whose testimony concerning the material issues is undisputed and uncontradicted, (R. 36-38), we believe to be sufficient, standing alone, to clearly demonstrate this contention of the appellant. The testimony of the appellant and all other witnesses do not differ as to the unjust discrimination. The decree of the District Court should be reversed.

## XVI.

**Cases which have been cited by some of the defendants in prior stages of this proceeding which we claim are not in point.**

In view of the fact that a brief period of time is allowed for a reply brief by the appellant, we take the liberty of now calling to the attention of this Honorable Court a number of cases, which have been heretofore cited by some of the defendants as sustaining the right to discriminate against citizens of the United States, solely on account of their race and color.

*Plessy* v. *Ferguson,* 163 U. S. 537, 538, 540, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), has been cited to sustain the application of a separate coach law in interstate commerce. A mere reading of the case will demonstrate its inapplicability. At page 538, it is stated:

> "That on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from *New Orleans to Covington in the same State,* etc."

This clearly shows that any question raised or decided must necessarily relate to intrastate transportation and not interstate. The well rendered dissenting opinion of Mr. Justice Harlan clearly sustains the present views of all liberty loving American citizens, and we urge that this masterpiece be given consideration in support of the contention of the appellant that

> "Any discrimination against an American citizen, travelling as a passenger in interstate commerce in the United States solely on account of his race or color is unjust, unreasonable and unAmerican, and not only

violates our Constitution and the laws enacted under it, but is at war with our basic conception of a democratic society and a representative government.''[70]

It is respectfully submitted that if the judgment of the District Court and the report of the Interstate Commerce Commission is permitted to stand as a part of the law of this nation, it will carry out the prophecy of Mr. Justice Harlan in his dissenting opinion rendered in *Plessy* v. *Ferguson,* 163 U. S. 537, p. 559, which is as follows:[71]

559 ''In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. It was adjudged in that case that the descendants of Africans, who were imported into this country and sold as slaves were not included nor intended to be included under the word 'citizens' in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were 'considered as a subordinate and inferior class of beings, who had
560 been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.' 19 How. 393, 404. The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But

---

[70] *Smith* v. *Texas,* No. 33, October Term, 1940, U. S. Supreme Court, Opinion, November 25, 1940; *Plessy* v. *Ferguson,* 163 U. S. 537, at p. 559.

[71] This portion of the dissenting opinion of Mr. Justice Harlan in *Plessy* v. *Ferguson,* 163 U. S. 537-559 is specifically referred to.

it seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight million of blacks. The destinies of the two races, in this country, are both indissolubly linked together, and the interest of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

"The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United

States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis
561 of race, and cunningly devised to defeat legitimate results of the war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when travelling in a passenger coach or a public highway than when members of the same race sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot-box in order to exercise the high privilege of voting."

The case of *Plessy* v. *Ferguson*, 163 U. S. 537, was distinguished in *Buchanan* v. *Warley*, 245 U. S. 60, (p.) 79. The facts in this case clearly show that appellant was not furnished first class accommodations and facilities equal to those furnished other first class interstate passengers, travelling on the same interstate journey and train with the appellant and who had paid a similar rate of fare for transportation.

In *Plessy* v. *Ferguson*, 163 U. S. 537, 540, it will be noted that no question of the application of the separate coach law of Louisiana to *interstate* transportation was involved nor decided, and the case decided, only, a local question

of *intrastate commerce.* Cases are cited in the opinion concerning the separation of American citizens solely by reason of their race or color, but the cases cited were only applicable at that time to local laws concerning local situations or matters which the Supreme Court of the State had held applicable only within the State without any reference to interstate commerce.

In *Berea College* v. *Commonwealth of Kentucky,* 211 U. S., 45, 53, 54, 29 S. Ct., 33, 53 L. Ed. 81 (1908) is not applicable to the case at bar. This case is also distinguished in *Buchanan* v. *Warley,* 245 U. S. 60, 79. The *Berea College* case, *supra,* involved an indictment against a local corporation for violation of a State law requiring the separation of students on account of color and race, alone. The Court in deciding that the matter involved a local situation concerning the relation of a domestic corporation to the State by which it was created, held (p. 53-54):

> "The State which grants to a corporation a charter and reserves the right to amend, alter and regulate the corporation could do so because the corporation only exists by virtue of the conditions stated in its charter. * * *
>
> Power exercised by the State over the corporation could not be exercised over an individual without violating the constitutional rights of the individual."

In the case at bar, the constitutional rights of a citizen is in issue. This case does not apply to the case at bar.

In the case of *Chiles* v. *Chesapeake & Ohio Railway,* 218 U. S. 71, 72, 74, (1910), 54 L. Ed. 936, 30 S. Ct. 667, the mere reading of the opinion will clearly show that the Court of Appeals, which is the highest court in Kentucky, having held that the Segregation or Separate Car laws

of the State of Kentucky only applied to *intrastate* commerce, and not to interstate commerce, no question was raised nor decided in this case, concerning the application of the Separate Car Act as applying to interstate commerce, and the court states (p. 72):

> "The Court of Appeals of the State made the case turn on a narrow ground, to wit: *'The right which it was decided, a railroad company had to establish such rules and regulations as will require white and colored passengers, although they may be interstate to occupy separate compartments upon the train.'* The Court however, said that there could be no discrimination in accommodations."

The Court at page 74 also states:

> "There is a statute of Kentucky which requires railroad companies to furnish separate coaches for white and colored passengers, *but the Court of Appeals of the State put the statute out of consideration, declaring that it had no application to* INTERSTATE TRAINS, and defendant in error does not rest its defense upon that Statute, but upon its rules and regulations."

In the case at bar there is no defense by the defendants of rules and regulations and they rest upon the Statute of Arkansas which does not apply to *interstate commerce.*[72]

---

[72] In the re-direct examination of the witness Jones who was the conductor in charge of the Rock Island Train at the time of the occurrence, April 20, 1937, by Mr. Taylor, attorney for the Rock Island, stated he was not enforcing any rules of the company but was acting under color of the separate car law of Arkansas, and the following appears of record (R. 178):

> "Q. I want to ask you again, because I may have misunderstood your answers: Have you ever been

*Smith* v. *Tennessee*, 46 S. W. 566, 100 Tenn. 494, 41 L.R.A. 432 (1898), was decided about 40 years ago and is only the opinion of a state court during that period of the development of the United States. No colored passenger was claiming that his constitutional rights had been violated nor that a person of color had been unjustly discriminated against solely by reason of his race or color. This case was dismissed in this court on motion (Oct. Term 1900, 21 S. Ct. 917, 45 L. Ed. 1256) and was not reviewed by this court.

The *Smith* case, *supra*, has only been cited and followed by the Supreme Court of Mississippi in *Southern Railway Company* v. *Norton*, 73 So. 1, 112 Miss. 302 (Dec. 4, 1916), and *Southern Railway Company* v. *Primrose*, 73 So. 2, companion cases.

The case of *Alabama Railway Company* v. *Morris*, 103 Miss. 511, 60 So. 11, Ann. Cas. 1915B, 613, is only the decision of a state court which has not been approved nor followed in modern times. The Tennessee Court in refer-

---

given any instructions or directions or any rules with reference to how you shall treat colored passengers in Pullman coaches, by the railway company?

"A. No, sir.

"Q. I understood you, and maybe I misunderstood you, somewhere in your examination to answer counsel that something was according to the rules of the company. Were you referring there, or did you intend to refer there (fol. 329) to your practice of undertaking to enforce the Arkansas Separate Coach Law?

"A. Oh, I get what you mean now. No. I meant, *I was enforcing the law, not the rules of the company.* It is not the rules of the company. It is the law, that I am enforcing, and not the rules of the company, because I have never had any instructions from any one on the railroad as to just how to handle these cases, so that it was left up to me.

"Mr. Taylor: That is all."

ring to the applicability of the State Separate Coach Law to interstate commerce (46 S. W. p. 571) said:

> "That question is an open one under the decisions of the Supreme Court of the United States."

This was an indictment against an agent of a railway company operating within the State of Tennessee. The learned Justice delivering the opinion in *Smith* v. *Tennessee*, 41 S. W. 566, must have overlooked *Brown* v. *Memphis and C. Ry. Company*, 5 Fed. 499 (C. C. Tenn. 1880), in which the Federal Court in Tennessee stated the law concerning the applicability of the Separate Coach Law of Tennessee as follows (p. 501):

> "That this act of the legislature, so far as it abrogated the common law right of case for wrongful exclusion from railroad cars or roads running between two or more states is *unconstitutional*, because it was a regulation of commerce between the states, which is it, the legislature, *had no right to make, the exclusive right to make it being by the Constitution of the United States, in Congress. Hall* v. *DeCuir*, 95 U. S. 485."

In *Southern Railway Company* v. *Norton*, 73 So. 1, 112 Miss. 302, was not reviewed by this Honorable Court. No question was involved concerning the violation of the constitutional rights of an American citizen of color, and the railroad company operating within the State of Mississippi, apparently, was satisfied with the decision.

The Supreme Court of Maryland in *Hart* v. *State*, 60 Atl. 457, 463, 100 Md. 595 (1905), refused to follow *Smith* v. *Tennessee*, 46 S. W. 566, and stated that the Supreme Court of the United States on analogous questions had held to the contrary.

In *South Covington & Cincinnati S. T. Ry. Co.* v. *Kentucky*, 252 U. S. 399, 40 S. Ct. 378 (Decided April 19, 1920),

in which case Mr. Justice McKenna delivered the opinion of the Court, a mere reading of the opinion will disclose that the case is not applicable to the issues involved in the case at bar.

The facts show that the defendant Street Ry. Co., had gained control of the entire stock of a corporation chartered by the State of Kentucky; that the Kentucky Corporation had been granted certain rights by the State of Kentucky; that each termini and all stations of the Cincinnati, Covington and Erlanger Ry. Co., were within the State of Kentucky; that the crime charged in the indictment was for the unlawful operation of the railway within the State of Kentucky; that there was a distinct operation within the State of Kentucky under the State charter granted by the State of Kentucky, and *that the operation alone was regulated and not interstate character, except incidentally;* that the interurban railway company derived all of its power from the charter granted by the State of Kentucky and the Court states (40 S. Ct. 379):

> "* * * An interurban railroad company deriving its powers from the State, and subject to obligations under the laws of the state, *should not be permitted to exercise the powers given by the state and escape its obligations to the state under the circumstances presented by this record, by running its coaches beyond the state lines.*"

The Court further states (40 S. Ct. 379):

> "There was a distinct operation in Kentucky, an operation authorized and required by the charters of the companies and it is that operation, the act in question regulates, and does no more, and therefore is not a regulation or interstate commerce. This is the effect

of the ruling in *South Covington Ry. Co.* v. *Covington*, 235 U. S. 537, 35 S. Ct. 158, 59 L. Ed. 350, L. R. A. 1915, F. 792."

Mr. Justice Day dissenting (40 S. Ct. 380), states:

"It is admitted that this regulation would not apply to interstate passengers, and colored passengers going from Cincinnati to Kentucky on a through trip would not be subjected to the regulations."

In this case there was no claim by a citizen that his rights under the Fourteenth Amendment of the United States Constitution and the enforcement act had been violated.

In *Cozart* v. *Southern Ry. Company*, 16 I. C. C. 226, 230, (1909), the complaint was dismissed because the evidence failed to support the charge contained in the complaint but the commission reaffirmed the doctrine stated in *Edwards* v. *Nashville Chattanooga and St. Louis Railway, et al.*, 12 I. C. C. Rep. 247.[73]

In *Gaines* v. *Seaboard Air Line Ry. et al.*, 16 I. C. C. 471, (1909), a mere reading of the report of the commission will clearly demonstrate that the case has no application to the case at bar.

---

[73] The language of the Commission p. 230, is as follows:
"In *Edwards* v. *N. C. and St. L. Ry. et al.*, 12 I. C. C. Rep. 247, the principle was enunciated that common carriers may not, in the accommodations which they furnish to each, unjustly discriminate between white and colored passengers paying the same fare. On that authority of that decision and the cases there cited, the principle is here reaffirmed."

## CONCLUSION.

Simple justice in the interpretation and application of the Federal Constitution, the Fourteenth Amendment and all laws made pursuant thereto, should require equality in interstate transportation of all American citizens without regard to race or color, as any other interpretation will nullify their plain and unambiguous provisions.

Respectfully submitted,

RICHARD E. WESTBROOKS,
ARTHUR W. MITCHELL, *pro se*,
*Attorneys for Appellant.*